CIVIL SERVICE REFORM IV: STREAMLINING APPEALS PROCEDURES

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL SERVICE

OF THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

NOVEMBER 29, 1995

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CIVIL SERVICE REFORM IV: STREAMLINING APPEALS PROCEDURES

WEDNESDAY, NOVEMBER 29, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL SERVICE,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 2154, Rayburn House Office Building, Hon. John L. Mica (chairman of the subcommittee) presiding.

Present: Representatives Mica, Bass, Morella, Moran, Holden, and Clinger [ex officio].

Staff present: George Nesterczuk, staff director; Garry Ewing, counsel; Caroline Fiel, clerk; Cedric Hendricks, minority professional staff; and Jean Gosa, minority staff assistant.

Mr. MICA. Good morning. I would like to call this meeting of the House Civil Service Subcommittee to order and welcome you.

Today's hearing deals with the important subject of streamlining the appeals procedure for Federal Government employees. This is the fourth in a series of hearings we have held relating to civil service reform.

This hearing is a continuation of our October 26 review of performance and accountability in our Federal Government. We heard in that hearing that the complex and prolonged appeals procedures are important reasons why Federal managers often do not take actions against poor performers.

Since becoming chairman of this subcommittee, I have heard a constant drumbeat of complaints relating to the cumbersome appeals procedures. There are too many reasons for employees to file appeals and too many ways for employees to take advantage of the system. A recent MSPB issue paper called for a reexamination of the current multilevel—as they termed it—multiagency appeals process because they deter managers from taking actions that are warranted.

I believe it is time to re-examine the complex structure of appeals that Congress has established for the Federal Government work force, and, as the charts we have set up here show, the current appeals process is a rather complex procedure.

There are five Federal agencies and 21 Presidential appointees involved in various administrative procedures set up to resolve Federal employment disputes. According to GAO, in fiscal year 1994 the Government used 760 Federal employees and almost $100 million to resolve employment disputes in the Federal Government.

There is an interesting case that I want to cite, and that is the case of Edward J. Lynch, which illustrates how convoluted these procedures can be. Mr. Lynch's saga began in March 1982 when the Department of Education fired him for unauthorized absences and poor performance.

The main part of his case ended more than 12 years later, when the U.S. Court of Appeals for the Federal Circuit handed down its second ruling in the case. Mr. Lynch had been ordered reinstated by the MSPB years earlier. That order was not overturned.

During the course of this one case, there were 10 administrative and judicial rulings. Four Federal agencies—the Department of Education, the MSPB, the EEOC, and OPM—and two Federal courts were involved at some point in this one case alone.

Certainly we can guarantee fairness to the Federal employees using simpler procedures without expending so much Federal resources. As we examine the appeals process, we should be guided by certain principles, and I have set some of these forward, and we will hear from some of our panelists about them, but I believe these principles that we should adhere to are as follows.

First, employees deserve due process. They should have the opportunity to tell their side of the story to someone who will independently listen to them and be objective.

I have participated in some of the Travelgate hearings that were held and that dramatized some of the problem. We heard of White House officials who fired civil servants and didn't even bother giving them an opportunity to reply to some of the charges against them.

Second, the procedures should be simple and straightforward.

Third, taxpayers deserve a process that does not discourage managers from taking disciplinary actions when justified.

And finally, everyone—taxpayers, managers and employees alike—must be confident that when employees are disciplined, they are disciplined for the right reasons. They need assurance that proper actions will be upheld and that management mistakes will be corrected.

Making Government and Federal employees responsible and accountable must be our ultimate goal as we consider changing the appeals process, as we move forward in our civil service reform process.

We are fortunate today to hear from a distinguished group of witnesses who are most knowledgeable about the Federal appeals procedures and Federal appeals process. Our first panel consists of Timothy Bowling of GAO, who has studied these systems carefully, and Allan Heuerman, an Associate Director of the Office of Personnel Management. OPM plays a key role in the appeals process as a litigator and as the Government's central personnel agency. It also acts as an adjudicator in some cases.

The witnesses on our second panel are the heads of the Merit Systems Protection Board, the Federal Labor Relations Authority and the Equal Employment Opportunity Commission. These are the agencies that hear most of the Federal employment appeals. They are joined also today by Special Counsel, Kathleen Day Koch, who, on behalf of the employees, litigates important cases involving

whistleblowers and prohibited personnel practices. She also enforces the Hatch Act.

Finally, on our third panel we have a former chairman of the MSPB, the general counsel of the Senior Executives Association, an assistant counsel of the National Treasury Employees Union, and a former general counsel of the Merit Systems Protection Board.

I want to thank all of our witnesses for coming today and participating, and the various organizations who contributed to this hearing, and I look forward to the hearing, the thoughts on making positive changes and reforms to this complicated appeals process and procedure.

Those are my opening comments, and I would like to yield to the ranking member, the distinguished gentleman whom I saw at the green round table this morning as I was brushing my teeth, Mr. Moran.

Mr. MORAN. The off-the-record thing? Did I say anything you disagree with?

Mr. MICA. No.

Mr. MORAN. Good.

Well, thank you, Mr. Chairman.

We have got to tackle this issue of the appeals process if we ever hope to reform the civil service system. So we need to be having this hearing.

There is no question in my mind, and I suspect there won't be in any of the panel's mind, if there even is now, that the appeals process for Federal employees is far too complicated, it is far too confusing, and it is far too long.

Both the perception and I suspect we will find out that the reality is that the process, in fact, does deter managers from disciplining poor performance or initiating appropriate action when there are significant conduct problems.

The Merit Systems Protection Board emphasized in its report that—and I am quoting here—the wide choice of review paths available to employees serves to exacerbate the hesitancy of managers to take appropriate actions against poor performance.

That is bureaucratese to say that it is very difficult to manage in the Federal Government, and one of the reasons is that the structure lends itself to all—well, to not just inefficiency but to deliberate delay and too many opportunities to obfuscate the problem and to delay the process. So we are going to have to figure out how to reform it, not just whether it needs to be reformed.

The second panel is going to be useful because we will hear from the people who are responsible for each of the separate processes for the current appeals process. I think everyone is going to testify that they are doing exactly what they need to do and that they are essential. They may very well be. My statement here says that they are, but I still have a little bit more open mind on that.

The EEOC, as we know, hears allegations of discrimination. I was troubled that some of the longest appeals and the agency that has the most appeals seems to be within the EEOC. So it sort of tells you that if you understand how the EEOC process works, you can certainly exploit it to your advantage.

The Merit Systems Protection Board hears appeals from other agencies for removals and suspensions and reductions in pay and

denials of within-grade increases. The Merit Systems Protection Board has had kind of an up and down history in terms of public support and use by the White House. At times, they have been completely marginalized. At other times, they have been used relatively effectively.

The Federal Labor Relations Authority administers the Federal Labor Relations Program and the statute that protects the rights of Federal employees to participate in unions.

And then we have got this Office of Special Counsel, the investigative and prosecutorial agency, that goes before the MSPB.

It seems on paper that it is more than is needed for an efficient and effective appeals process. But they all have their individual role, and right now each of those missions of each of those agencies is necessary, both from the standpoint of management as well as employees.

I think that the processes that they conduct need to be streamlined, and we would at least do that in civil service reform, but we have got to make sure that what we set in place, with whatever civil service reform bill we undertake, it is not going to just represent another swing of the pendulum.

You know, so often we decentralize and then we figure it is far more efficient to centralize and to put everything in one agency, and then 4 years later we decide it ought to be decentralized, it is too bureaucratized in the one agency, and so on. I hope we can put together a structure that has an enduring quality to it, if not a rational one.

So with that, I am anxious to hear the witnesses. I appreciate your having the hearings, Mr. Chairman.

Mr. MICA. I thank the gentleman and would yield for an opening statement to the vice chairman, Mr. Bass.

Mr. BASS. Thank you very much, Mr. Chairman.

I would just like to associate myself with the remarks of both the chairman and the ranking member. I am looking forward to the testimony of the witnesses, and I will yield back. I ask unanimous consent to submit a written statement for the record.

Mr. MICA. Without objection, so ordered.

[The prepared statement of Mr. Bass follows:]

Statement on Streamlining Federal Employee Appeals Procedures
By Congressman Charles F. Bass
11/29/95

Thank you, Mr. Chairman. As we are all aware, federal employees exist in a professional world complicated by a baffling maze of rules and regulations entirely unknown to their private sector counterparts. Perhaps the most complicated of all the proceedings for federal employees is the appeal of a managerial decision.

Currently, the multilayered appeals process allows for the involvement of a number of appellate bodies, including the Office of Personnel Management, the Merit Systems Protection Board, the Equal Employment Opportunities Commission, the Office of the Special Counsel, and the Federal Labor Relations Authority. Additionally, the process can weave back and forth between administrative and judicial proceedings without any finality. In fact, after being handed an undesirable decision in one proceeding, a dissatisfied federal employee has any number of options to begin the appeal completely anew.

The uncertainty of the current appeals process, as well as its costs, necessitate reform. The advantages to federal managers of a clearly delineated appeals process are obvious. Managers need to assert decision-making authority without the threat of eternal appeal. While we all agree that steps must be taken to guarantee the rights of the employee, a streamlined appeals process would allow the federal system to better perform its duties and serve the American people. Therefore, Mr. Chairman, I welcome the opportunity to participate in this hearing and bring to light the important testimony of today's witnesses.

Mr. MICA. I will yield now to the gentlelady from Maryland, Mrs. Morella.

Mrs. MORELLA. Thank you, Mr. Chairman. I want to thank you for calling this hearing, and I want to commend you on the experts that you have assembled to testify today.

During these hearings on civil service reform, we have heard over and over again about how the appeals system in government needs to be changed. We heard it from the unions, the associations that represent managers and executives, officials of the administration, and Members of the House. Those discussions, or exchanges in some cases, provided good information, and today we have the opportunity to get more definitive information.

The reasons for wanting to streamline the system differ, but the goal of streamlining seems to be consistent across the board. This is not change for change's sake, this is change to tame a system so it better serves the Government, executives, and managers, and employees.

"Federal employment disputes generally take too long and cost too much to resolve and, in some cases, are not resolved in a manner that promotes the efficiency of government service." That statement was made by Bruce Moyer, president of the Federal Managers Association.

"The fact is that the real problem preventing agencies taking performance actions is the ability of employees to thwart such actions by filing complaints against their supervisors and managers with numerous agencies." That statement was made by Carol A. Bonosaro, president of the Senior Executive Association.

"Where poor performers are allowed to remain on the job, it is because of timid or incompetent managers who either will not or cannot root them out. If we are really serious about this issue, one of the areas we should be looking at more closely is the length of time it takes for the appeal of performance-based removal to wind its way through the administrative and judicial thickets. An employee whose removal case was heard by an arbitrator or the MSPB has received a full and fair hearing consistent with due process rights." That statement was made by John Sturdivant, national president of the American Federation of Government Employees.

"There are opportunities to streamline this somewhat unwieldy structure and therefore direct the administration to develop a legislative proposal to restructure all Federal employee adjudicatory functions and submit this plan to Congress no later than February 1, 1996," concluded the Treasury-Postal appropriations conferees.

So clearly these different purposes, some based on performance, some based on too many layers, others based on alleged abuses of the complaints process, will lead to change, and that is what this hearing is all about.

So I look forward to hearing from the panels, and, again, I thank you, Mr. Chairman, for calling this hearing.

Mr. MICA. I thank the gentlelady.

I see that we have the chairman of our full committee with us this morning, the Honorable William Clinger, back from floor battle.

Mr. CLINGER. A losing battle.

Mr. MICA. Welcome. If you have any remarks, we would welcome them.

Mr. CLINGER. Thank you very much, Mr. Chairman.

I just want to commend you for holding these series of hearings and especially this one. This is, indeed, a convoluted, arcane, and very complex system that we are looking at. It deserves to be looked at in depth and very thoroughly.

In my former life I was a Schedule C political employee. I dealt with some of these problems and know just exactly how difficult it is to work within the Federal system and to accomplish the kinds of change that we need to be able to accomplish in a rapidly changing world and have a work force that is capable of addressing those very complex needs.

So this is an important hearing, and I am delighted to be here and to be able to listen to some of these witnesses. Thank you very much for holding it.

Mr. MICA. I thank the chairman and the gentleman for his remarks, and we will proceed with the hearing at this time. We have our first two witnesses and our first panel: Mr. Timothy Bowling, Associate Director of the U.S. General Accounting Office, and Mr. Allan Heuerman, Associate Director of the Office of Personnel Management.

As is customary, gentlemen, if you will stand, I will swear you in. Please raise your right hand.

[Witnesses sworn.]

Mr. MICA. Welcome again. Both of you have been before our subcommittee. It is nice to see you again. We have the question of streamlining the Federal appeals process. We will call on Mr. Bowling first from the GAO for your comments, and if you have a lengthy statement, as you know, we will be glad to make it part of the record, and if you could summarize your remarks into about 5 minutes apiece, we would appreciate that.

Thank you.

STATEMENTS OF TIMOTHY BOWLING, ASSOCIATE DIRECTOR, U.S. GENERAL ACCOUNTING OFFICE; AND ALLAN HEUERMAN, ASSOCIATE DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

Mr. BOWLING. Thank you, Mr. Chairman. I will do so.

I am pleased to be here today to discuss the administrative redress system for Federal employees. As more voices are heard calling for streamlining or consolidating this system, I would like to address the question of how well the system is working and whether, in its present form, it contributes to or detracts from the fair and efficient operation of the Federal Government.

I have basically three points to make. First, because of the complexity of this system and the variety of redress mechanisms it affords, it is inefficient, expensive, and time consuming.

Second, because the system is so strongly protective of the redress rights of the individual workers, it is vulnerable to employees who would take undue advantage of these protections.

Third, alternatives to the current redress system do exist. These alternatives in the private sector and elsewhere may be worth further study as Congress considers modifying the Federal system.

Although one of the purposes of this Civil Service Reform Act was to streamline the previous redress process, the system that has emerged is far from simple. Today four independent agencies hear employee complaints or appeals. While the boundaries of these agencies may appear to be neatly drawn, in practice they form a tangled scheme.

One reason is that a given case may be brought before more than one of the agencies, a circumstance that adds time-consuming steps to the redress process and may result in the agencies reviewing each others' decisions.

Matters are further complicated by the fact that each of the adjudicatory agencies has its own procedures and its own body of case law, although the Office of Special Counsel offers Federal employees the opportunity for hearings, but all vary in the degree to which they can require participation of witnesses or the production of evidence. They also vary in their authority to order a corrective action and enforce their decisions. What's more, the law provides for further review of these agencies' decisions or, in the case of discrimination claims, even de novo trials in the Federal courts.

Beginning in the employing agency, proceeding through one or more of the adjudicatory bodies and then carried to its conclusion in court, a single case can take years. The most frequently cited example of jurisdictional overlap in the redress system is the so-called mixed case.

A Federal employee who has been fired or who has experienced any of several other major adverse actions can appeal the agency's decision to MSPB. Likewise, a Federal employee who feels that he or she has been discriminated against can appeal to EEOC. But an employee who has been fired and feels that the firing was based on discrimination can essentially appeal to both MSPB and EEOC.

The employee first appeals to MSPB, with hearing results further appealable to MSPB's three-member board. If the appellant is still unsatisfied, he or she can then appeal MSPB's decision to EEOC. If EEOC finds discrimination where MSPB did not, the two agencies try to reach an accommodation.

If they cannot do so, an event that has occurred only three times in 15 years, which is a significant point, a three-member Special Panel is convened to reach a determination. At this point, the employee who is still unsatisfied with the outcome can file a civil action in U.S. District Court, where the case can begin again with a de novo trial.

The complexity of mixed cases has attracted a lot of attention. There are two facts about mixed cases particularly worth noting. First, few mixed cases coming before MSPB result in a finding of discrimination.

Second, when EEOC reviews MSPB's decisions in mixed cases, it almost always agrees with them. In fiscal year 1994, for example, MSPB decided roughly 2,000 mixed case appeals. It found that discrimination had occurred in just eight of these.

During the same year, EEOC ruled on appellants' appeals of MSPB's findings of nondiscrimination in 200 cases. EEOC disagreed with MSPB's findings in just three. In each instance, MSPB adopted EEOC's determination.

One result of this sort of a jurisdictional overlap and duplication is simple inefficiency. In mixed cases an appellant can, at no additional risk, have two agencies review his or her appeal. These agencies rarely differ in their determinations, but an employee has little to lose by asking both agencies to review his or her case.

Just how much this multilevel, multiagency redress system costs is hard to ascertain. We know that in fiscal year 1994, the share of the budgets of the four agencies that was devoted to individual employees' appeals and complaints totaled $54.2 million. We also know that in 1994, employing agencies reported spending almost $34 million investigating discrimination complaints. In addition, over $7 million was awarded for complainants' legal fees and costs in discrimination cases alone.

Many of the other costs cannot be pinned down, such as the direct costs accrued by employing agencies while participating in the appeals process, arbitration costs, the various costs tied to productivity in the workplace, and, of course, court costs.

Individual cases can take a long time to resolve, especially if they involve claims of discrimination. For example, among discrimination cases closed during fiscal year 1994 for which there was a hearing before an EEOC administrative judge and appeal of an agency final decision to the Commission itself, the average time from the filing of the complaint with the employing agency to the Commission's decision on the appeal was over 800 days.

As things stand today, Federal workers have substantially greater employment protections than do private-sector employees. While most larger and medium-sized companies have multistep administrative procedures through which their employees can appeal adverse actions, these workers cannot in general, appeal the outcome to an independent agency.

Compared with Federal employees, their rights to take their employer to court are also limited, and even when private sector workers complain of discrimination to EEOC, they receive less comprehensive treatment than do executive branch Federal workers, who, unlike their private sector counterparts, are entitled to evidentiary hearings before an EEOC administrative judge as well as a trial in District Court.

What are the implications of the extensive opportunities for redress provided Federal workers? Federal employees file workplace discrimination complaints at roughly 10 times the per capita rate of private sector employees.

At the employing agency level, the prospect of having to deal with lengthy and complex procedures can affect the willingness of managers to deal with conduct and performance issues.

In 1991 we reported that over 40 percent of personnel officials, managers, and supervisors interviewed said that the potential for an employee using the appeal or arbitration process would affect a manager's or supervisor's willingness to pursue a performance action.

At a time when Congress and the administration are considering opportunities for civil service reform, organizations outside the executive branch of the Federal Government, including, I believe, the private sector, may be useful sources for ideas on reforming the administrative redress system.

For example, it may be worth studying those segments of the civil service left partially or entirely uncovered by the current redress system, such as the intelligence agencies and FBI employees.

It should also be noted that legislative branch employees are treated differently from those in the executive branch. For example, under the Congressional Accountability Act of 1995, beginning this January, congressional employees with discrimination complaints will be required to choose between two redress alternatives, one administrative and one judicial.

The effect of this arrangement is to avoid the opportunity for the, "two bites at the apple," one administrative, one judicial, currently afforded executive branch employees. Congress may find that experience with the new system and operation may be instructive for considering how best to provide employees redress.

Today, in the face of tight budgets and a rapidly changing environment, the civil service is undergoing renewed scrutiny by the administration and by Congress. There are so many facets of the civil service system currently under review, no area should be overlooked that offers the opportunity for improving the way the Government operates.

To the extent that the Federal Government's administrative redress system is tilted toward employee protections at the expense of the effective management of the Nation's business, it deserves congressional attention.

This concludes my prepared statement, Mr. Chairman. I would be pleased to answer any questions that you or other members of the subcommittee may have at the appropriate time.

[The prepared statement of Mr. Bowling follows:]

United States General Accounting Office

GAO

Testimony

Before the Subcommittee on Civil Service,
Committee on Government Reform and
Oversight
House of Representatives

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FEDERAL EMPLOYEE REDRESS: An Opportunity for Reform

Statement of
Timothy P. Bowling, Associate Director
Federal Management and Workforce Issues
General Government Division

GAO/T-GGD-96-42

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The purpose of the redress system for federal employees is to uphold the merit system principles by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. But how well is the redress system working, and does it add to or detract from the fair and efficient operation of the federal government? In response to these questions, GAO makes three points:

-- First, because of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.

-- Second, because the system is so strongly protective of the redress rights of individual workers, it is vulnerable to employees who would take undue advantage of these protections. Its protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems. Further, the demands of the system put pressure on employees and agencies alike to settle cases--regardless of their merits--to avoid potential costs.

-- Third, alternatives to the current redress system do exist. These alternatives, in the private sector and elsewhere, may be worth further study as Congress considers modifying the federal system.

Leading private sector and nonfederal employers have told GAO that managers in their organizations are held accountable for treating people fairly but are also given the flexibility and discretion to make the tough decisions that are an inevitable part of managing well. These organizations recognize that a balance must be struck between individual employee protections and the authority of managers to operate in a responsible fashion. To the extent that the federal government's administrative redress system is tilted toward employee protections at the expense of the effective management of the nation's business, it deserves congressional attention.

FEDERAL EMPLOYEE REDRESS: An Opportunity for Reform

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the administrative redress system for federal employees. The current redress system grew out of the Civil Service Reform Act of 1978 (CSRA) and related legal and regulatory decisions that have occurred over the past 15 years. The purpose of the redress system is to uphold the merit system principles by ensuring that federal employees are protected against arbitrary agency actions and prohibited personnel practices, such as discrimination or retaliation for whistleblowing. Today, as more voices are heard calling for streamlining or consolidating the redress system, I would like to address the question of how well the redress system is working and whether, in its present form, it contributes to or detracts from the fair and efficient operation of the federal government.

I have three points to make:

-- First, because of the complexity of the system and the variety of redress mechanisms it affords federal employees, it is inefficient, expensive, and time-consuming.

-- Second, because the system is so strongly protective of the redress rights of individual workers, it is vulnerable to employees who would take undue advantage of these

protections. Its protracted processes and requirements divert managers from more productive activities and inhibit some of them from taking legitimate actions in response to performance or conduct problems. Further, the demands of the system put pressure on employees and agencies alike to settle cases--regardless of their merits--to avoid potential costs.

-- Third, alternatives to the current redress system do exist. These alternatives, in the private sector and elsewhere, may be worth further study as Congress considers modifying the federal system.

I would like to make one additional observation: Leading private sector and nonfederal employers have told us that managers in their organizations are held accountable for treating people fairly but are also given the flexibility and discretion to make the tough decisions that are an inevitable part of managing well. These organizations recognize that a balance must be struck between individual employee protections and the authority of managers to operate in a responsible fashion. To the extent that the federal government's administrative redress system is tilted toward employee protection at the expense of the effective management of the nation's business, it deserves congressional attention.

My observations today are based on interviews with officials at the adjudicatory agencies, the Office of Personnel Management (OPM), and the now defunct Administrative Conference of the United States; analysis of data on case processing provided by the adjudicatory agencies; and a review of the redress system's underlying legislation and other pertinent literature.[1] In addition, my remarks draw upon a symposium GAO held in April of this year at the request of Senator William V. Roth, Jr., then Chairman of the Senate Governmental Affairs Committee, with participants from the governments of Canada, New Zealand, and Australia, as well as private sector employers such as Xerox, Federal Express, and IBM.[2] The proceedings added to our awareness and understanding of current employment practices outside the federal government.

A COMPLEX AND DUPLICATIVE SYSTEM

Today, executive branch civil servants are afforded opportunities for redress at three levels: first, within their employing agencies; next, at one or more of the central adjudicatory agencies; and finally, in the federal courts. Although one of

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[1]My comments focus on the redress processes available to individual employees, both within and outside of collective bargaining units, but not on the collective bargaining processes under which unions can appeal agency actions affecting the groups they represent.

[2]We will be issuing a full report on the symposium in the near future.

the purposes of CSRA was to streamline the previous redress system, the scheme that has emerged is far from simple. Today, no fewer than four independent agencies hear employee complaints or appeals. The Merit Systems Protection Board (MSPB) hears employee appeals of firings or suspensions of more than 14 days, as well as other significant personnel actions. The Equal Employment Opportunity Commission (EEOC) hears employee discrimination complaints[3] and reviews agencies' final decisions on complaints.[4] The Office of Special Counsel (OSC) investigates employee complaints of prohibited personnel actions--in particular, retaliation for whistleblowing. For employees who belong to collective bargaining units and have their individual grievances arbitrated, the Federal Labor Relations Authority (FLRA) reviews the arbitrators' decisions.[5]

While the boundaries of the appellate agencies may appear to be neatly drawn, in practice these agencies form a tangled scheme. One reason is that a given case may be brought before more than one of the agencies--a circumstance that adds time-consuming steps to the redress process and may result in the adjudicatory

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[3]Complaints may be filed for unlawful employment discrimination on the bases of race, color, religion, sex, national origin, age, or handicap.

[4]In addition, EEOC receives and investigates employment discrimination charges against private employers and state and local governments.

[5]In addition, employees can appeal position classifications to OPM.

agencies reviewing each other's decisions. Matters are further complicated by the fact that each of the adjudicatory agencies has its own procedures and its own body of case law. All but OSC offer federal employees the opportunity for hearings, but all vary in the degree to which they can require the participation of witnesses or the production of evidence. They also vary in their authority to order corrective actions and enforce their decisions.

What's more, the law provides for further review of these agencies' decisions--or, in the case of discrimination claims, even de novo[6] trials--in the federal courts. Beginning in the employing agency, proceeding through one or more of the adjudicatory bodies, and then carried to conclusion in court, a single case can take years.

An Inefficient System: The Mixed Case Example

The most frequently cited example of jurisdictional overlap in the redress system is the so-called "mixed case." A tenured federal employee who has been fired (or who has experienced any of several other major adverse actions such as a demotion) can appeal the agency's decision to MSPB. Likewise, a federal employee who feels that he or she has been discriminated against

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[6]In a de novo trial, a matter is tried anew as if it had not been heard before.

can appeal to EEOC. But an employee who has been fired, and who feels that the firing was based on discrimination, can essentially appeal to both MSPB and EEOC. The employee first appeals to MSPB, with hearing results further appealable to MSPB's three-member Board. If the appellant is still unsatisfied, he or she can then appeal MSPB's decision to EEOC. If EEOC finds discrimination where MSPB did not, the two agencies try to reach an accommodation. If they cannot do so--an event that has occurred only three times in 15 years--a three-member Special Panel is convened to reach a determination. At this point, the employee who is still unsatisfied with the outcome can file a civil action in U.S. district court, where the case can begin again with a de novo trial.

A mixed case can become even more complicated and duplicative if it is adjudicated under the provisions of a collective bargaining agreement, which may lead to a hearing before an arbitrator. If the employee goes through arbitration (which his or her union must approve and for which it generally pays part of the cost) and is left unsatisfied by the arbitrator's ruling, he or she can appeal the arbitrator's ruling to MSPB, starting the adjudication process almost from scratch.

The complexity of mixed cases has attracted a lot of attention. But two facts about mixed cases are particularly worth noting. First, few mixed cases coming before MSPB result in a finding of

discrimination. Second, when EEOC reviews MSPB's decisions in mixed cases, it almost always agrees with them. In fiscal year 1994, for example, MSPB decided roughly 2,000 mixed case appeals. It found that discrimination had occurred in just eight. During the same year, EEOC ruled on appellants' appeals of MSPB's findings of nondiscrimination in 200 cases. EEOC disagreed with MSPB's findings in just three. In each instance, MSPB adopted EEOC's determination.

One result of this sort of jurisdictional overlap and duplication is simple inefficiency. A mixed case appellant can--at no additional risk--have two agencies review his or her appeal. These agencies rarely differ in their determinations, but an employee has little to lose in asking both agencies to review his or her case.

A Costly System, With Many Costs Unknown

Just how much this multilevel, multiagency redress system costs is hard to ascertain. We know that in fiscal year 1994, the share of the budgets of the four agencies that was devoted to individual federal employees' appeals and complaints totaled $54.2 million (see table 1). We also know that in fiscal year 1994, employing agencies reported spending almost $34 million investigating discrimination complaints. In addition, over $7 million was awarded for complainants' legal fees and costs in

discrimination cases alone.[7] But many of the other costs cannot be pinned down, such as the direct costs accrued by employing agencies while participating in the appeals process, arbitration costs, the various costs tied to lost productivity in the workplace, employees' unreimbursed legal fees, and court costs. All these costs either go unreported or are impossible to clearly define and measure.

Table 1. Portion of Budgets for Adjudicatory Agencies Devoted to Individual Federal Employee Appeals and Complaints, Along with Cases Received in FY 1994

Agency	Budget (millions $)	Cases received
MSPB	24.7	10,341[a]
EEOC	19.4	16,637[b]
OSC	8.0	1,837[c]
FLRA	2.1	97[d]
Total	54.2	28,912

[a]Total of initial appeals and petitions for review of initial appeals.
[b]Total of requests for hearings before an administrative judge and appeals to the Commission of agency final decisions.
[c]These complaints contained 3,471 separate allegations of prohibited personnel practices.
[d]Number of appeals of arbitration awards decided in FY 1994.

Source: OMB data, agency data, and agency estimates.

A Time-Consuming System, Especially in Discrimination Cases

Individual cases can take a long time to resolve--especially if

[7]Consists of legal fees and costs (1) paid by agencies in discrimination complaints resolved by administrative procedures and (2) paid from the Judgment Fund for settlements and judgments arising out of lawsuits.

they involve claims of discrimination. Among discrimination cases closed during fiscal year 1994 for which there was a hearing before an EEOC administrative judge and an appeal of an agency final decision to the Commission itself, the average time from the filing of the complaint with the employing agency to the Commission's decision on the appeal was over 800 days.[8]

One reason it takes so long to adjudicate a discrimination case is that the number of discrimination complaints has been climbing rapidly. As shown in table 2, from fiscal years 1991 to 1994, the number of discrimination complaints filed increased by 39 percent; the number of requests for a hearing before an EEOC administrative judge increased by about 86 percent; and the number of appeals to EEOC of agency final decisions increased by 42 percent. Meanwhile, the backlog of requests for EEOC hearings increased by 65 percent, and the inventory of appeals to EEOC of agency final decisions tripled.[9]

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[8]EEOC processed requests for hearings before an administrative judge in an average of 154 days. The Commission processed appeals of agency final decisions in an average of 185 days. Cases before MSPB are processed more quickly but still take a long time. In fiscal year 1994, MSPB processed initial appeals in an average of 81 days and processed appeals of initial decisions to the three-member Board in an average of 162 days.

[9]EEOC officials told us that they have undertaken an assessment of discrimination complaint processing for federal employees and expect to complete the study in early 1996.

Table 2: Increase in Discrimination Complaints, FYs 1991 to 1994

	FY 1991	FY 1994	Percent increase
Complaints filed with employing agencies	17,696	24,592	39.0
Requests for EEOC hearing[a]	5,773	10,712	85.6
Appeals to EEOC of agency final decisions	4,167	5,925	42.2

[a]These caseload data do not include mixed case appeals to MSPB.

Source: EEOC.

IMPLICATIONS OF THE FOCUS ON EMPLOYEE RIGHTS

One reason Congress placed employee redress responsibilities in several independent agencies was to ensure that each federal employee's appeal, depending on the specifics of the case, would be heard by officials with the broadest experience and expertise in the area. In its emphasis on fairness to all employees, however, the redress system may be allowing some employees to abuse its processes and may be creating an atmosphere in which managing the federal workforce is unnecessarily difficult.

As things stand today, federal workers have substantially greater employment protections than do private sector employees. While most large or medium-size companies have multistep administrative procedures through which their employees can appeal adverse actions, these workers cannot, in general, appeal the outcome to an independent agency. Compared with federal employees, their

rights to take their employer to court are also limited. And even when private sector workers complain of discrimination to EEOC, they receive less comprehensive treatment than do executive branch federal workers, who, unlike their private sector counterparts, are entitled to evidentiary hearings before an EEOC administrative judge, as well as a trial in U.S. district court.

Another characteristic of the redress system for federal employees is that certain kinds of complaints receive more prominence or attention than others. OSC, for instance, was established primarily to investigate cases in which federal employees complain of retaliation against them for whistleblowing. If OSC findings support the employee and the employing agency fails to take corrective action, OSC's findings become part of the employee's appeal before MSPB. OSC's investigation is at no cost to the employee. If OSC's findings do not support the employee, he or she may proceed with an appeal to MSPB as if no investigation had ever been made.[10] The OSC investigation, therefore, is not just cost-free to the employee, but risk-free as well.

Discrimination is another kind of complaint to which the redress system gives fuller or more extensive protection than other complaints or appeals. Clearly, more administrative redress is

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[10]In addition, the employee who complains of retaliation for whistleblowing can appeal matters to MSPB that ordinarily would not be appealable to that agency.

available to employees who claim they have been discriminated against than to those who appeal actions to MSPB. For example, workers who claim discrimination before EEOC--unlike those appealing a firing, lengthy suspension, or downgrade to MSPB--can file a claim even though no particular administrative action has been taken against them. Further, those who claim discrimination are entitled, at no cost, to an investigation of the matter by their agencies, the results of which are made part of the record. Further still, if they are unsatisfied after EEOC has heard their case and any subsequent appeals, they can then go to U.S. district court for a de novo trial, which means that the outcome of the entire administrative redress process is set aside, and the case is tried all over again.

What are the implications of the extensive opportunities for redress provided federal workers? Federal employees file workplace discrimination complaints at roughly 10 times the per capita rate of private sector workers. And while some 47 percent of discrimination complaints in the private sector involve the most serious adverse action--termination--only 18 percent of discrimination complaints among federal workers are related to firings.

Another phenomenon may be worth noting. Officials at EEOC and elsewhere have said that the growth since 1991 in the number of discrimination complaints by federal employees is probably an

outgrowth of passage of the Civil Rights Act of 1991, which raised the stakes in discrimination cases by allowing complainants to receive compensatory damages of up to $300,000 and a jury trial in District Court.[11]

Vulnerability to Misuse

Officials from EEOC and other agencies have said they are burdened by cases that are not legitimate discrimination complaints. We were told that some employees file complaints as a way of getting a third party's assistance in resolving a workplace dispute. We were also told that some file frivolous complaints to harass supervisors or to game the system.

All sorts of matters become the subject of discrimination complaints, and they are accorded due process. Here are two examples, drawn from recent issues of the newsletter Federal Human Resources Week: A male employee filed a formal complaint when a female co-worker with whom he had formerly had a romantic relationship "harassed him by pointedly ignoring him and moving away from him when they had occasion to come in contact." Another claimed that he was fired in part on the basis of his national origin: "American-Kentuckian."

[11]Figures on compensatory damage awards are not available. These amounts are not reported separately, but are, instead, lumped together with figures for back pay awards. Back pay awards increased nearly threefold from $8.2 million in fiscal year 1991 to $24.1 million in fiscal year 1994.

We are not in a position to judge the legitimacy of these complaints. We note, however, that EEOC's rulings on the complainants' appeals affirmed the agency's position that there was no discrimination. We would also make the point that federal officials spent their time--and the taxpayers' money--on these cases.

Inhibiting Managers and Encouraging Settlements

At the employing agency level, the prospect of having to deal with lengthy and complex procedures can affect the willingness of managers to deal with conduct and performance issues. In 1991, we reported that over 40 percent of personnel officials, managers, and supervisors interviewed said that the potential for an employee using the appeal or arbitration process would affect a manager's or supervisor's willingness to pursue a performance action.[12]

At the adjudicatory agency level, one effect of complex and time-consuming redress procedures has been to spur the trend toward settlements. About two-thirds of the adverse action and poor performance cases at MSPB were settled in 1994 instead of being decided on their merits. Similarly, during the same period, about one-third of the discrimination complaints brought before

[12] Performance Management: How Well Is the Government Dealing With Poor Performers? (GAO/GGD-91-7, October 1990).

EEOC were settled without a hearing. Employing agencies settle many more complaints before they ever get that far.

While the trend toward settling cases has helped avoid a lot of adjudication, there is some concern about the larger implications of the practice. In a given employee's case, the possibility of avoiding the potential costs of seeing the process through to the bitter end--costs that include not just time and money but human endurance--may be driving the inclination to settle. Federal officials, in deciding whether or not to settle, must weigh the cost of settling against the potential loss of more taxpayer dollars and the time and energy that would be diverted from the business of government.

There is some concern that policies encouraging the contending parties to compromise on the issues may conflict with the mission of the adjudicatory agencies to support the merit principles and may set troublesome precedents or create ethical dilemmas for managers.[13] Further, there is concern that settlements may be fundamentally counterproductive, especially in discrimination complaints, where settlement policies may in fact encourage the filing of frivolous complaints.

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[13]An example is the occasional settlement agreement not to give the separated employee a bad employment reference. The supervisor who argued for the employee's dismissal may not be allowed to give good-faith answers to a prospective employer who calls for a reference.

IN SEARCH OF ALTERNATIVES

At a time when Congress and the administration are considering opportunities for civil service reform, looking in particular to the private sector and elsewhere for alternatives to current civil service practices, organizations outside the executive branch of the federal government may be useful sources for ideas on reforming the administrative redress system.

In most private sector organizations, final authority for decisions involving disciplinary actions rests with the president or chief executive officer. Some firms give that authority to the personnel or employee relations manager. But others have turned to some form of alternative dispute resolution (ADR), especially in discrimination complaints.[14] Some firms use outside arbitrators or company ombudsmen. Still others employ committees or boards made up of employee representatives and/or supervisors to review or decide such actions. We have not studied the effectiveness of these private sector practices, but they may provide insight for dealing with redress issues in a fair but less rigidly legalistic fashion than that of the federal redress system.

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[14]For a discussion of ADR methods private sector employers use, see our report Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution (GAO/HEHS-95-150, July 1995).

In the same regard, federal agencies are exploring alternatives to rigid, formal grievance processes. The use of ADR methods was, in fact, called for under CSRA and underscored by the Administrative Dispute Resolution Act of 1990, the Civil Rights Act of 1991, and regulatory changes made at EEOC. Based not only on the fact that Congress has endorsed ADR in the past, but also that individual agencies have taken ADR initiatives and that MSPB and EEOC have explored their own initiatives, it is clear that the need for finding effective ADR methods is widely recognized in government. However, our preliminary study of government ADR efforts last year indicated that agency efforts are, by and large, in their early stages. Right now, results are too sketchy to be of use, but eventually it would be helpful to know if agencies pursuing ADR approaches have achieved savings in time and money and whether their employees have found ADR methods fair and equitable.

Other areas that may be worth studying are those segments of the civil service left partially or entirely uncovered by the current redress system. For example, while almost all federal employees can bring discrimination complaints to EEOC, employees in their probationary periods, temporary employees, unionized postal workers, intelligence agency and FBI employees, and certain other employees generally cannot appeal adverse actions to MSPB. In addition, intelligence agency and FBI employees, as well as certain other employees, are not covered by federal service labor

relations legislation and therefore cannot form bargaining units or engage in collective bargaining. What are the implications of the varying levels of protection on the fairness with which these employees are treated? Are there lessons here that might be applied elsewhere in the civil service?

Finally, it should be noted that legislative branch employees are treated differently from those in the executive branch. For example, under the Congressional Accountability Act of 1995, beginning in January 1996 congressional employees with discrimination complaints will be required to choose between two redress alternatives, one administrative and one judicial. The administrative alternative will allow employees to appeal to the Office of Compliance, with hearing results appealable to a five-member board. The board's decisions may then be appealed to the U.S. Court of Appeals for the Federal Circuit, which has a limited right of review. The other alternative will be to bypass the administrative process and file suit in U.S. District Court, with the opportunity to appeal the court's decision to the appropriate U.S. Court of Appeals. The effect of this arrangement is to avoid the opportunity for the "two bites of the apple"--one administrative, one judicial--currently offered executive branch employees. Congress may find that experience with the new system in operation may be instructive for considering how best to provide employees redress.

AN OPPORTUNITY TO IMPROVE THE WAY GOVERNMENT OPERATES

Today, in the face of tight budgets and a rapidly changing work environment, the civil service is undergoing renewed scrutiny by the administration and Congress. In the broadest sense, the goal of such scrutiny is to identify ways of making the civil service more effective and less costly in its service to the American people. With so many facets of the civil service under review--including compensation and benefits, performance management, and the retirement system--no area should be overlooked that offers the opportunity for improving the way the government operates. To the extent that the federal government's administrative redress system is tilted toward employee protections at the expense of the effective management of the nation's business, it deserves congressional attention.

This concludes my prepared statement, Mr. Chairman. I would be pleased to take any questions that you or other Members of the Subcommittee may have.

(966669)

Mr. MICA. I thank you, and we will get back to questions in just a few minutes.

We are going to hear now from our second witness, Allan Heuerman, who is the Associate Director of the Office of Personnel Management.

Welcome back. You are recognized.

Mr. HEUERMAN. Thank you, Mr. Chairman. It is a pleasure to appear back before you on this important issue.

Mr. Chairman and members of the subcommittee, I appreciate this opportunity to come here today to discuss the Federal Government's appeals process. I will summarize my written submitted statement.

As the agency responsible for human resource management policy in the executive branch and for protecting the merit system, OPM believes that improving the Federal Government's appeals process can substantially contribute to a more effective and efficient Federal Government.

While the dispute resolution process is only one aspect of OPM's interest in good government, it is an important one. Disputes with employees, taking action against employees, and appealing and defending agency actions have cost and value implications that can affect the health and effectiveness of both individual employees and the organization. Consequently, we commend you and the subcommittee for providing this opportunity for its review.

In my written testimony, it is noted that today's topic involves consolidation in at least two basic senses: One, consolidation of the various appeal systems; and, two, consolidation of the appeals agencies.

My testimony also notes the importance of ensuring that the interests of the stakeholders are addressed in any consolidation efforts and suggests that stakeholders include at least the appeals agencies themselves, Federal employees, Federal employee representatives, Federal agencies as employers, management officials, and, of course, most importantly, the taxpayer.

OPM is also a distinct stakeholder in the dispute resolution and appeals system. A key responsibility of OPM is to ensure that the Government's commitment to merit principles is met, and OPM works to fulfill this responsibility in a number of ways.

One, by protecting and assisting in the implementation of the merit system principles; two, by regulating for Government agencies the process to be used in taking adverse actions against Federal employees for conduct or performance reasons, which, in turn, has a direct impact on the outcome of an appeal; third, by using OPM's statutory authority to intervene in employee disputes before third parties, including arbitrators, so that matters having substantial impact on merit systems laws and regulations are correctly and consistently decided; and, fourth, by exercising its oversight role to identify and remedy systemic problems that adversely impact on merit principles.

As part of its efforts to help implement National Performance Review initiatives, OPM has also taken a number of steps to help agencies improve their capacity to prevent and deal with employee disputes.

The first line of defense against the costs and complexities of the current appeals system is, we believe, effective alternative dispute resolution, or ADR, at the agency level. We believe that ADR initiatives are consistent with the focus of your subcommittee's concern with the appeals process, and we would urge that, at the same time efforts are made to reform the formal appeals systems, equal efforts are made to prevent and resolve disputes at the agency level.

This subcommittee's initiative is the first legislative look at the appeals systems in many years. There are many stakeholders involved. The systems have significant historical origins and involve fundamental values. For example, the current right to a third party appeal stems from the Veterans Preference Act of 1944. Further, the systems are encrusted with years and volumes of legal decisions.

In short, it is a complex and controversial area. Consequently, OPM is not recommending at this time specific changes. We believe there needs to be more information gathering, analysis, and dialog among the stakeholders before specific positions are taken.

Nonetheless, we believe there are two specific areas which directly affect OPM's responsibilities where we would like to suggest the possibility of some changes. In one of these areas OPM litigates hundreds of appeals at the Merit Systems Protection Board every year that arise under the Civil Service Retirement System and the Federal Employees Retirement System.

Many of these appeals concern straightforward provisions of law with which an appellant disagrees but which neither OPM nor the Board has authority to waive. An example would be a foreign national employee of the Navy Department who never contributed to the retirement system but believes he should nonetheless receive an annuity.

In a case like this, the employee receives initial and reconsideration decisions from OPM that explain why he or she is not entitled to an annuity. However, under current rules a person also has a right to a hearing at MSPB, and we believe there may be room for streamlining in this particular area.

A second area, and one we alluded to earlier, is OPM's central role in intervening in appeals to ensure that its regulations are properly interpreted and that the meaning and intent of the civil service laws enacted by Congress are adhered to.

This special role—this special OPM role principally manifests itself in appeals of adverse actions and performance-based actions. Employing agencies possess no power to appeal erroneous decisions to MSPB and arbitrators.

OPM alone possesses authority, although very limited, to seek judicial review of adverse actions of MSPB and arbitrators. We do this to protect the interests of the Federal Government and the civil service when the Director of OPM determines that an erroneous decision would have a substantial impact on civil service law. Any changes to the appeals system need to preserve and possibly strengthen this role.

Currently, the U.S. Court of Appeals for the Federal Circuit may second-guess OPM's determination of substantial impact by deciding which of the small number of cases that OPM chooses to appeal

to hear. This anomalous power of a judicial body to review and substitute its judgment for that of the person chosen by the President to administer and oversee civil service has made it more difficult for OPM to secure uniform interpretation of the law.

We have used our power to seek judicial review of MSPB and arbitrable decisions sparingly, never more than a dozen to 15 times a year, even though there are close to 10,000 decisions each year by MSPB and arbitrators.

Eliminating the discretion of the Court of Appeals to hear a petition by the Director should not result in more petitions by the Director. Rather, we believe this would lead to more effective administration of civil service laws and that in the long run the existence of effective use of this power creates less, and not more, litigation.

In conclusion, we emphasize that any changes to the current appeals system or the appeals agencies should reflect the need to have the most efficient and effective merit-based government possible while at the same time ensuring that the rights of individuals are preserved. OPM stands ready to assist you in any way you think would be useful.

We thank you for this opportunity, and I will be glad to answer any questions.

[The prepared statement of Mr. Heuerman follows:]

STATEMENT OF
ALLAN D. HEUERMAN
ASSOCIATE DIRECTOR
HUMAN RESOURCES SYSTEMS SERVICE
U.S. OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
U.S. HOUSE OF REPRESENTATIVES

on

CONSOLIDATING THE APPEALS PROCESS

November 29, 1995

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I APPRECIATE THE OPPORTUNITY TO COME HERE TODAY TO DISCUSS THE FEDERAL GOVERNMENT'S APPEALS PROCESS.

MR. CHAIRMAN, AS THE AGENCY RESPONSIBLE FOR HUMAN RESOURCE MANAGEMENT POLICY IN THE EXECUTIVE BRANCH AND FOR PROTECTING THE MERIT SYSTEM, OPM BELIEVES THAT IMPROVING THE FEDERAL GOVERNMENT'S APPEALS PROCESS CAN SUBSTANTIALLY CONTRIBUTE TO A MORE EFFECTIVE AND EFFICIENT FEDERAL GOVERNMENT. IN THIS REGARD, WE BELIEVE THAT OPM'S DUTY TO ENSURE THAT CIVIL SERVICE LAWS, RULES AND REGULATIONS ARE PROPERLY APPLIED IN THE VARIOUS APPEALS FORUMS HAS AFFORDED US WITH A UNIQUE EXPERIENCE AND PERSPECTIVE THAT WE ARE ABLE TO DRAW ON IN DISCUSSING THIS

IN ADMINISTRATIVE OVERHEAD COSTS, IT MAY HAVE LITTLE INFLUENCE ON HOW EFFICIENTLY AND EFFECTIVELY THE VARIOUS APPEALS SYSTEMS ARE ADMINISTERED. IN ADDITION, THE CONSOLIDATION OF AGENCIES MAY BE RELATIVELY EASY TO ACCOMPLISH WHILE THE CONSOLIDATION OF THE VARIOUS APPEALS SYSTEMS MAY BE MORE CONTROVERSIAL, PERHAPS REQUIRING NEW WAYS OF VIEWING EMPLOYEE DUE PROCESS AND EMPLOYEE APPEAL RIGHTS. THESE ISSUES WERE LAST SUBSTANTIVELY ADDRESSED WHEN THE CIVIL SERVICE REFORM ACT OF 1978 WAS ENACTED AND WHICH, AMONG OTHER THINGS, TRIED TO HELP MANAGERS DEAL WITH EMPLOYEES WHO ARE POOR PERFORMERS.

ANOTHER CONSIDERATION, OF COURSE, IS TO ENSURE THAT THE INTERESTS OF THE STAKEHOLDERS IN THE APPEALS PROCESS ARE UNDERSTOOD AND ADDRESSED. AS WE SEE IT, THERE ARE SIX MORE OR LESS DISTINCTIVE, BUT BY NO MEANS MONOLITHIC, STAKEHOLDERS. SOME OF THESE CATEGORIES OVERLAP TO SOME DEGREE AND INDIVIDUALS MAY BE MEMBERS OF MORE THAN ONE GROUP.

FIRST, THERE ARE THE APPEALS AGENCIES THEMSELVES, INCLUDING OPM WHICH HAS RESPONSIBILITY FOR ADJUDICATING JOB CLASSIFICATION APPEALS AND FAIR LABOR STANDARDS ACT COMPLAINTS. HERE, EACH AGENCY HAS BEEN CHARGED BY CONGRESS WITH ADMINISTERING SOME

RECOGNIZED LABOR UNIONS OR PERHAPS MANAGERS' ORGANIZATIONS, ARE STAKEHOLDERS. THESE REPRESENTATIVES OFTEN HAVE THE ADVANTAGE OF SEEING THE GENERIC NEEDS OF THOSE THEY REPRESENT AND ARE ABLE TO ARTICULATE WAYS TO ADDRESS THOSE NEEDS. SOME OF THESE ORGANIZATIONS HAVE ALREADY PROVIDED SUGGESTIONS FOR CHANGING THE APPEALS SYSTEM.

FOURTH, FEDERAL AGENCIES GENERALLY ARE STAKEHOLDERS IN THIS PROCESS. HERE, THE NEEDS OF AGENCIES VARY CONSIDERABLY DEPENDING ON THEIR MISSIONS. FOR EXAMPLE, AN AGENCY WITH A LAW ENFORCEMENT MISSION MAY HAVE A VERY DIFFERENT PERSPECTIVE ON EMPLOYEE DUE PROCESS COMPARED WITH A NON-LAW ENFORCEMENT AGENCY.

FIFTH, "MANAGEMENT OFFICIALS" OF FEDERAL AGENCIES HAVE SPECIFIC NEEDS. A KEY NEED OF THIS STAKEHOLDER GROUP IS TO BE ABLE TO MANAGE HUMAN RESOURCES IN THE MOST EFFICIENT AND EFFECTIVE MANNER POSSIBLE WHILE STILL RESPECTING THE RIGHTS OF EMPLOYEES AS DEFINED BY THE VARIOUS EMPLOYMENT LAWS. MANAGERS ARE INTERESTED IN ENSURING A PROPER BALANCE BETWEEN PROVIDING FOR DUE PROCESS AND FAIRNESS, AND THEIR ABILITY TO EFFECTIVELY MEET THEIR MANAGEMENT RESPONSIBILITIES.

ADEQUACY OF THEIR PERFORMANCE, INADEQUATE PERFORMANCE SHOULD BE CORRECTED, AND EMPLOYEES SHOULD BE SEPARATED WHO CANNOT OR WILL NOT IMPROVE THEIR PERFORMANCE TO MEET REQUIRED STANDARDS.

- EMPLOYEES SHOULD BE PROTECTED AGAINST ARBITRARY ACTION, PERSONAL FAVORITISM, OR COERCION FOR PARTISAN POLITICAL PURPOSES.

OPM WORKS TO FULFILL THIS RESPONSIBILITY IN A NUMBER OF WAYS--

- BY PROTECTING AND ASSISTING IN THE IMPLEMENTATION OF THE MERIT SYSTEM PRINCIPLES;
- BY REGULATING FOR GOVERNMENT AGENCIES THE PROCESS TO BE USED IN TAKING ADVERSE ACTIONS AGAINST FEDERAL EMPLOYEES FOR CONDUCT OR PERFORMANCE REASONS, WHICH IN TURN HAS A DIRECT IMPACT ON THE OUTCOME OF AN APPEAL;
- BY USING OPM'S STATUTORY AUTHORITY TO INTERVENE IN EMPLOYEE DISPUTES BEFORE THIRD PARTIES, INCLUDING ARBITRATORS, SO THAT MATTERS HAVING SUBSTANTIAL IMPACT ON MERIT SYSTEM LAWS AND REGULATIONS ARE CORRECTLY AND CONSISTENTLY DECIDED; AND
- BY EXERCISING ITS OVERSIGHT ROLE TO IDENTIFY AND REMEDY SYSTEMIC PROBLEMS THAT ADVERSELY IMPACT ON MERIT

WE BELIEVE THESE ADR INITIATIVES ARE CONSISTENT WITH THE FOCUS OF YOUR SUBCOMMITTEE'S CONCERN WITH THE APPEALS PROCESS. WE WOULD URGE THAT AT THE SAME TIME EFFORTS ARE MADE TO REFORM THE FORMAL APPEALS SYSTEM EQUAL EFFORTS ARE MADE TO PREVENT AND RESOLVE DISPUTES AT THE AGENCY LEVEL.

THIS SUBCOMMITTEE'S INITIATIVE IS THE FIRST LEGISLATIVE LOOK AT THE APPEALS SYSTEM IN MANY YEARS. THERE ARE MANY STAKEHOLDERS INVOLVED. THE SYSTEMS HAVE SIGNIFICANT HISTORICAL ORIGINS AND INVOLVE FUNDAMENTAL VALUES. FOR EXAMPLE, THE CURRENT RIGHT TO A THIRD PARTY APPEAL STEMS FROM THE VETERANS PREFERENCE ACT OF 1944. FURTHER, THE SYSTEMS ARE ENCRUSTED WITH YEARS AND VOLUMES OF LEGAL DECISIONS. IN SHORT, IT'S A COMPLEX AND CONTROVERSIAL AREA. CONSEQUENTLY, OPM IS NOT RECOMMENDING AT THIS TIME SPECIFIC CHANGES. WE BELIEVE THERE NEEDS TO BE MORE INFORMATION GATHERING, ANALYSIS AND DIALOGUE AMONG THE STAKEHOLDERS BEFORE POSITIONS ARE TAKEN.

NONETHELESS, WE BELIEVE THERE ARE SOME AREAS WHERE CHANGE MIGHT BE APPROPRIATE AND WHICH WE WILL DISCUSS IN MORE DETAIL. IN ONE OF THESE AREAS, OPM LITIGATES HUNDREDS OF APPEALS AT THE MERIT SYSTEMS PROTECTION BOARD (MSPB OR THE BOARD) EVERY YEAR

REGULATIONS TO DEVOLVE MORE AUTHORITY AND DISCRETION UPON INDIVIDUAL AGENCIES TO MEET THEIR PARTICULAR NEEDS. WE BELIEVE IT IS EXCEPTIONALLY IMPORTANT THAT THE REMAINING REGULATIONS, WHICH ARE NECESSARY TO MAINTAIN AN ORDERLY AND EFFECTIVE CIVIL SERVICE, BE IMPLEMENTED AND INTERPRETED UNIFORMLY BY ADJUDICATORY AGENCIES TO PROTECT OUR CIVIL SERVICE AND ITS EMPLOYEES FROM ACTIONS BY EMPLOYING AGENCIES AND DECISIONS BY ADJUDICATORS THAT ARE INCONSISTENT WITH LAW.

THIS SPECIAL OPM ROLE PRINCIPALLY MANIFESTS ITSELF IN APPEALS OF ADVERSE ACTIONS AND PERFORMANCE-BASED ACTIONS. EMPLOYING AGENCIES POSSESS NO POWER TO APPEAL ADVERSE ERRONEOUS DECISIONS OF MSPB AND ARBITRATORS ACTING IN ITS STEAD AS PART OF A GRIEVANCE PROCEDURE. OPM, AND OPM ALONE, POSSESSES AUTHORITY (ALTHOUGH VERY LIMITED) TO SEEK JUDICIAL REVIEW OF ADVERSE DECISIONS OF MSPB AND ARBITRATORS TO PROTECT THE INTERESTS OF THE GOVERNMENT AND THE CIVIL SERVICE AS A WHOLE WHEN THE DIRECTOR OF OPM DETERMINES THAT AN ERRONEOUS DECISION WOULD HAVE A SUBSTANTIAL IMPACT ON CIVIL SERVICE LAW.

ANY CHANGES TO THE APPEALS SYSTEM NEEDS TO PRESERVE AND POSSIBLY STRENGTHEN THIS ROLE. CURRENTLY, THE U.S. COURT OF

AND THAT, IN THE LONG RUN, THE EXISTENCE AND EFFECTIVE USE OF THIS POWER CREATES LESS, NOT MORE LITIGATION. THIS IS BECAUSE OPM'S PURPOSE IN SEEKING JUDICIAL REVIEW ON SUCH MATTERS AS POOR PERFORMANCE IS TO CLARIFY LEGAL PRINCIPLES AND TO SIMPLIFY THEIR APPLICATION IN A UNIFORM WAY. WE BELIEVE CLARITY IN OVERARCHING LEGAL PRINCIPLES INEVITABLY WILL REDUCE THE NEED FOR LENGTHY AND TIME-CONSUMING LITIGATION. THUS, A MORE EFFECTIVE AND EFFICIENT CIVIL SERVICE MIGHT BE THE RESULT OF CHANGES IN THIS AREA.

IN CONCLUSION, WE REEMPHASIZE THAT ANY CHANGES TO THE CURRENT APPEALS SYSTEM OR THE APPEALS AGENCIES SHOULD REFLECT THE NEED TO HAVE THE MOST EFFICIENT AND EFFECTIVE MERIT-BASED GOVERNMENT POSSIBLE WHILE AT THE SAME TIME ENSURING THAT THE RIGHTS OF INDIVIDUALS ARE PRESERVED. IN THIS REGARD, OPM STANDS READY TO ASSIST YOU IN ANY WAY YOU THINK WOULD BE USEFUL.

THANK YOU FOR THE OPPORTUNITY TO DISCUSS THIS TOPIC WITH YOU TODAY. I WILL BE HAPPY TO RESPOND TO ANY QUESTIONS YOU MAY HAVE.

Mr. MICA. Thank you also for your testimony.

To get right into some of the questions, first for Mr. Bowling, I want to talk about the mixed cases.

In light of the high rate of agreement between MSPB and the EEOC on mixed cases, do you see any useful purpose to continuing the current mixed case procedure?

Mr. BOWLING. No. Actually, there does not seem to be an awful lot gained by this procedure.

Right now, the very small number of disagreements between the two agencies would indicate that the cost of having two reviews of the same case is really not being justified. So I would say that it is probably a good time to take a close look at that and see if it wouldn't be possible to eliminate one of those reviews, perhaps just let MSPB handle these cases.

Mr. MICA. Mr. Heuerman, did you want to comment?

Mr. HEUERMAN. Well, as I mentioned, Mr. Chairman, we are not in a position today to make specific recommendations regarding mixed cases or other significant aspects. However, I would agree that this obviously is an issue that needs to be on the table, needs to be looked at very carefully.

There are both pros and cons regarding this issue, and we at OPM would like to hear all sides of the story, so to speak, in terms of why the mixed case scenario exists, what the purposes of it are, and whether or not it really is needed or could be discontinued or streamlined.

Mr. MICA. Mr. Bowling, you noted in the processing of the EEOC complaints that in 1994 it took over 800 days, on average, to process a case that involved a hearing before an EEOC administrative judge and an appeal to the EEOC. Are there ways that Congress can streamline this complaint procedure to make it easier for EEOC to issue more timely decisions?

Mr. BOWLING. Yes, I am sure there are. I understand that EEOC is now in the process of looking into ways of streamlining the process itself, and I think that is a useful thing for them to be doing.

I think it is also a very useful approach to explore the possibility of employing alternative dispute resolution techniques, ADR, that are now starting to grow up both in the private sector and in the Federal sector, by reducing the number of cases that—the case backlog that comes before EEOC that might well help the process to go considerably faster. But there may also be ways to simply reduce the number of levels of review within the process as we currently have it.

Mr. MICA. One of the other things that you noted is that Federal employees seem to file discrimination claims at a rate about 10 times—did you say 10 times—the rate of the private sector workers and by and large for less serious reasons.

Do you have any explanation for the discrepancies?

Are these accurate figures?

Mr. BOWLING. Yes, those are the accurate figures. That is correct.

The most likely explanation would be, I believe, that the incentives and the opportunities for filing such cases are more prevalent and more compelling in the Federal sector than the private sector.

In the Federal sector, there is a process set up for Federal employees to conveniently bring such cases and plenty of redress

available to carry through those cases almost as far as they would like to carry them. In the private sector, it is not quite so readily available, and the incentives for trying to move forward with a discrimination complaint would be somewhat less.

Mr. MICA. I think you said your study also indicates there is a perception that numerous frivolous EEOC cases are filed either to harass supervisors or to get a third party's assistance in resolving a workplace dispute. Are there steps Congress can take to discourage this practice?

Mr. BOWLING. There probably are some things that could be done. We don't have firm recommendations, but it might well be worth looking at the possibility of allowing the administrative judge to review cases for whether or not they are frivolous, meeting the criteria that are laid out in the Congressional Accountability Act legislation and, by applying those criteria, reduce the number of frivolous cases that are actually moved to the hearing phase.

Mr. MICA. One other question dealing with alternative dispute resolution: Are there any specific private sector techniques for resolving workplace disputes that Congress should examine as possible alternatives to our current system?

Mr. BOWLING. There are several different ways of doing it in the agencies. The ones we have talked with and reviewed show several steps within their agencies, an internal process, starting with a mediation process with a trained mediator.

In some cases they would then move to a peer review session where a panel would decide the issue, and then in others they would move these complaints up to the CEO or the vice president for human resources, who would then reach the final decision.

But in each case these are handled very expeditiously, and when the process has run its course, it is over, and everyone has the decision, and the end is reached rather than having a more unlimited prospect for review.

Mr. MICA. In the 1978 Civil Service Reform Act they set up a pretty stylized formal procedure for going through this appeals process. You are saying that we could be less formal? We could look at some alternative resolution procedures that, again, maybe adopt some of these private sector roads?

Mr. BOWLING. Yes, I believe that would be effective.

The Civil Service Reform Act of 1978 did have as one of its purposes to streamline the process, but we feel that that has not, in fact, happened. The process is still quite complex, perhaps more complex than before, and it has taken an awfully long time. The number of cases are building. The backlog is building.

Clearly it has not achieved that objective, and there are some alternatives for reducing the number of cases that would come into the system through using techniques such as ADR, and I think the private sector is a good place to look for how some of those are handled.

I would also add that there are some instances in the Federal sector where agencies are doing things on ADR as well that have been fairly effective, and I think that the Department of Agriculture has done some work in this area that might be worth looking at as well.

Mr. MICA. We thank you, and I will yield now to the gentleman from Virginia, Mr. Moran.

Mr. MORAN. Thank you, Mr. Chairman. I am going to followup on some of your questions as well.

Give me an example or two of a large corporation who is recognized as having an efficient and effective, fair personnel system.

Mr. BOWLING. Well, we talked with Federal Express and discussed with them how they go about doing it. They have a fairly clear process laid out. It is a several-step administrative process that reaches decisions on individual cases.

Mr. MORAN. Federal Express is on strike right now. I don't think that would be an ideal example.

Mr. BOWLING. They are indeed on strike. We talked to them about some other issues, other than that.

Mr. MORAN. Maybe you could give us another one that is not on strike.

Mr. BOWLING. We also have talked with AT&T and discussed with them some of their approaches.

Again, this is a difficult time in the private sector, as well as the Federal sector, for employees. There is a lot of downsizing going on, and if you are going to look for a place that doesn't have some employee concerns, there probably would not be a great number.

But the systems that they have put together are generally regarded as simpler and quicker in their resolution of issues but still maintain several layers of review for the cases which are not resolved appropriately at the earlier levels to be looked at again by senior agency officials, senior management officials.

Mr. MORAN. So they do have an appeals process in all of the large corporations?

Mr. BOWLING. I wouldn't say all of them, but yes, it is common to have an appeals process within the agency which would allow them to raise cases to higher levels.

Mr. MORAN. They don't have any mixed review though, of course.

Mr. BOWLING. No.

Mr. MORAN. The—we want to get at any possible restructuring, but we may want to hold off until we hear from the next panel.

With regard to these frivolous cases—and it would seem that some portion of complaints are—could be characterized as frivolous—there are so many now, and there is so—and there are disproportionate numbers in some agencies versus others that don't seem to bear any correlation to anything other than that particular agency has a better understanding of the appeals process.

One way we might do it, which seems to be the most rational, would be to have a triage process where perhaps the ALJ can simply review cases to determine whether they are—they appear to be frivolous at the outset and dismiss them.

If we don't do something like that, as far as I am concerned, I think there needs to be a built-in disincentive to push cases all the way, whether it is some proportion of the administrative cost of processing them or whatever. The nicer way to do it would be simply to have a screening process at the very outset.

Which agencies did you find were the worst in terms of examples of exploiting the system?

Mr. BOWLING. Actually, we don't have any data on individual agencies exploiting the system, because it is very difficult to tell from a distance what is a frivolous case and what is not. Certainly there are examples of frivolous cases.

I think your point is very well taken that a screening process of some sort up front, perhaps through the administrative judge, would eliminate a lot of these cases and send a message that one would need to be fairly secure in a sense of having a strong case before bringing it, and that would reduce the number of cases.

Now, I understand that EEOC has looked into the triage suggestion. I am not sure where they stand on that right now, but I understand that that has been discussed.

Mr. MORAN. We need to ask them. The number of discrimination complaints has skyrocketed.

Do you have a sense that that has more to do with gaming the system, or is that correlated in some way to greater discrimination in the Federal Government? Because it strikes me that there is an inverse correlation with discrimination within the Federal Government and the number of discrimination complaints, which is a curious inverse correlation.

But what would be your perception of that?

Mr. BOWLING. Well, I think you may be right. It is difficult to measure the exact amount of discrimination, but I think it is quite possible that an increased sensitivity and awareness to discrimination—although the discrimination training that has gone on, the Tailhook scandal and such incidents in the press, have heightened people's awareness as to what discrimination is and how to recognize it, and that, in part, would account for the increase in the number of cases. I think that is a very reasonable supposition.

Mr. MORAN. So this could be another example of no good deed going unpunished, that the greater sensitivity an agency or executive branch has, the greater receptivity they have to discrimination complaints, the more you are going to see, and so if they took a hard line approach, it would probably reduce the number of discrimination complaints or perhaps the sensitivity to it.

I don't want to be a—I don't want to sound insensitive myself, but some of these numbers are perplexing, particularly EEOC's.

Do you have any sense of the—I guess you have already told us that you really couldn't give us any estimation of the percentage of gaming or frivolous complaints that are processed, because you didn't look at them individually, but management certainly has suggested that almost a majority—well, a fair number of complaints are not of real substance, and I guess the proof would be in the pudding, the resolution of those complaints.

You have suggested—since my time is running out I am going to tie this into the last question, and that is: You imply in the report that the greater accommodation to settling cases might actually encourage more frivolous cases or gaming the system, as they say, because if you are willing to settle, then you are going to get something out of it without actually having to prove your case, and so there is an implication, you suggest, that we would be better off not settling as many cases, bringing them all the way to a final conclusion on the merits instead of the accommodation that is involved in settling cases.

Can you comment on that?

Mr. BOWLING. Well, certainly we are not opposed to settling cases appropriately. I think the point is, rather, that the pressure of the vast number of cases that are being brought now and the fact that they can drag on for a number of years and cost a lot of money for the agencies and for the taxpayers puts perhaps an undue pressure on the agencies to settle cases even when they may have a good case themselves and be able to win the case on its merits, and that——

Mr. MORAN. It is just not worth the cost and the time?

Mr. BOWLING. Exactly.

Mr. MORAN. And disruption?

Mr. BOWLING. Exactly.

There have been instances like that brought to our attention. I think that is one area that could be addressed simply by having—reducing the number of cases that come through the system and streamlining the process itself.

Mr. MORAN. OK. I had some questions for OPM, but they—I think OPM's responses might have been a little more predictable, and so I didn't ask them. But I appreciate your being here. Thank you.

Mr. MICA. I thank the gentleman, and I yield now for questions to Mr. Bass.

Mr. BASS. Thank you very much, Mr. Chairman. I just have a very brief follow-up to Mr. Moran's last question about settlements.

I didn't—I am not sure, Mr. Bowling, whether you indicated whether GAO was planning to undertake any kind of review of the settlement agreements to determine whether or not too many settlements are undermining the merit systems.

I think Mr. Moran made an allusion to the fact that maybe they should be—instead of settling, you should draw them out to their logical conclusions. Is this a real problem? Is the settlement, the number of settlements, a real problem, and is it undermining the merit system, and does it deserve some further review?

Mr. BOWLING. I think, as I was indicating, the number of settlements themselves is not necessarily a problem in that I would not argue that people should settle less necessarily.

I think the problem could be solved, rather, by simplifying, streamlining the system and dealing with more cases early on in the process to effective ADR, alternative dispute resolution, so that you don't have a backlog, such a pressure of cases and such a process that continues for such a lengthy period.

That is, I think, what brings undue pressure to settle—to have the wrong settlements or settle sometimes when merit would not indicate that it would be the wisest course.

So I think solving the problem at that end rather than just arbitrarily limiting the number of settlements would be more appropriate.

Mr. BASS. Thank you very much, Mr. Chairman. I yield back.

Mr. MICA. I would like to yield now to the gentlelady from Maryland, Mrs. Morella.

Mrs. MORELLA. Thank you, Mr. Chairman.

I also was most concerned about the skyrocketing number of discrimination cases, therefore leading to, I think, an average of 800 days in processing a claim.

And then I note also in your testimony there is a footnote that says that EEOC is now looking at assessing the discrimination complaint process and will have this report by early 1996.

Is your understanding that they are going to be looking at why there are so many discrimination cases in terms of categorizing what kinds of cases there are?

I mean, this may have something to say about the morale or what is going wrong, or when we talk about, you know, employee training programs, maybe this would give us some direction. Or is it going to be totally about what they can do to expedite the processing of them?

Surely there must be some reason, besides the sensitivity that you—that was mentioned earlier in terms of what kinds of cases there are.

Mr. BOWLING. Yes, I think both are legitimate subjects for inquiry, and I would defer to EEOC's own description of how they intend to pursue this study.

But I think you are right, there are other reasons than awareness of discrimination. I think, you know, it is possible that the training and understanding of how to process these claims and the accommodations the agencies have made in terms of civil rights offices and making the process user friendly may have the odd effect of actually increasing the number of cases that are brought.

But I think an inquiry into that subject could be fruitful.

Mrs. MORELLA. Mr. Chairman, we may want to do that, too. I would be very interested in having EEOC apprise us of what their objective is before we get the results of the study, if they undertake it.

A question to both of you. This deals with what has been mentioned in terms of the frivolous cases. Have there been cases where the agency has agreed to compensate them for the so-called frivolous complaints because it is more cost effective?

And if you don't know of any cases—there may be some—do you see this as a potential problem that could emerge under the current system and what we could do to negate it?

Mr. BOWLING. We have been told that, in fact, there are such cases where agencies do settle and, perhaps settle somewhat earlier or more inappropriately than they would have.

I have talked to agency human resources agencies that have told us they will, in fact, settle even when they think they are in the right, because they know by the time the case is done they will have spent more than what the settlement actually cost and chewed up more time as well, and the more appropriate way to get the case off the books would be to settle it.

Mrs. MORELLA. Do you see some way of remedying that possibility?

Mr. BOWLING. Well, I think making the process somewhat simpler and faster to pursue would probably go a long way toward creating that sense that we need to rush to settlement now, even if we have a good case, simply because we don't want to go through

years' worth—several years' worth, in some cases—worth of review and appeals.

So if court—if the process is simpler and shorter, then the agency might be willing to pursue those cases that it feels were more meritorious.

Mrs. MORELLA. Would you like to make any responsive comments, Mr. Heuerman?

Mr. HEUERMAN. I can't say, Mrs. Morella, that I am aware of any frivolous instances where agencies have settled what they clearly said were frivolous cases.

As Mr. Bowling indicated, we are, of course, aware of instances where agencies have settled issues where they believe that they were in the right, so to speak—in the right in the sense of, we know what the facts are, we know what the law is, but have also perceived that it is within their interest in terms of their basic objective, and that is to resolve the problem, either get the employee out of the workplace or take some other corrective action that the settlement process actually aids achieving what their ultimate objective is, even though they may be in the right, quote, unquote.

Mrs. MORELLA. I certainly would like to ask the opinion of both of you with regard to the consolidation of the four agencies, but I know that, Mr. Heuerman, you said that you couldn't give us a definitive response.

Mr. Bowling, you have commented on it, using the ADR procedure, such as Agriculture does, in looking at what the private sector does. But I do hope that as further ideas develop in terms of what advice you might want to give this committee, that you will feel free to do so.

In my remaining moment, let me just ask a hypothetical question. In the case of the furloughs that we have just experienced, what recourses would employees have who were furloughed or considered nonessential?

Let's say in the event that they were not—they had no promise of being paid. Would there be any recourses that they might have? What redresses; avenues?

Mr. HEUERMAN. Yes. A furlough action is appealable to the Merit Systems Protection Board or grievable under a negotiated grievance procedure, and employees were informed of that right as part of the furlough process.

Of course, because of the action of Congress in terms of providing retroactive pay, there was no furlough. So this will not be an issue with respect——

Mrs. MORELLA. But if it were, because if I——

Mr. HEUERMAN. Right. If they had not been—received back pay or retroactive pay for the time they were off duty and in a nonpay status, then that would have been an effective furlough and they would have had an appeal right.

Mrs. MORELLA. How would they have appealed? What would they have done? What would you have suggested? Not that you were going to suggest anything.

Mr. HEUERMAN. I don't know that we would—we would certainly inform them of how to appeal and where to appeal; that is, the agencies would. But it might be on the grounds of—that there was no cause for it, that they were in a position covered—that was

funded, that they were improperly considered excepted employees or nonexcepted employees, or that procedures weren't followed, that they weren't informed fully and completely as to the particulars of the furlough. Those would be the typical kinds of grounds.

Mrs. MORELLA. You couldn't file a class action suit with all of the Federal employees that had been furloughed? A possibility.

Mr. MORAN. Did you want to put that suggestion in writing?

Mrs. MORELLA. Now, listen, I don't want any shutdowns of government. I don't want any employees to be considered nonessential again. I can't think of anything more demoralizing than saying you are nonessential, you are essential, you are nonessential. So maybe we will never face that again, I hope.

Thank you, Mr. Chairman.

Thank you, gentlemen.

Mr. MICA. I thank the gentlelady. I also thank our panelists.

We may have additional questions. We will submit them to you in writing. We appreciate your cooperation in this morning's testimony and also in responding to further questions. So thank you, and we will excuse these witnesses.

I would like to call our second panel.

Mrs. MORELLA. Mr. Chairman, as you call the second panel, could I just mention to Mr. Heuerman that I am very fortunate, because at my back is the gentleman who is from OPM, who is what an—educational development specialist, and I must say, if he is indicative of the kinds of employees you have there, we could be very proud of OPM.

Mr. HEUERMAN. Thank very much.

Mrs. MORELLA. Thank you, Mr. Chairman.

Mr. HEUERMAN. We are very proud of him also.

Mr. MICA. Again, in calling our second panel, we have Benjamin Erdreich, who is chairman of the Merit Systems Protection Board; we have Phyllis Segal; she chairs the Federal Labor Relations Authority; we have Kathleen Day Koch, Special Counsel of the Office of Special Counsel; and we have Gilbert F. Casellas, chairman of the Equal Employment Opportunity Commission; a rather distinguished panel.

We would like to welcome you. I think for most of you, this is your first time here.

As is customary—this is an investigations and oversight subcommittee of Congress—we do swear in our witnesses, so I would ask you to all stand.

And I see you have someone else with you. Let me see. We have Tony Armendariz, a member of the Authority; Joseph Swerdzewski, general counsel; Betty Bolden, chair of the Federal Services Impact Panel.

I understand you may not testify, but we will swear you in anyway.

[Witnesses sworn.]

Mr. Mica. The record will reflect, the witnesses answered in the affirmative.

Again, I would like to welcome you to the subcommittee today. As is customary and I mentioned to our previous panel, if you have a lengthy statement, we would be glad to make that part of the

record. We would like you to summarize. We will put our little timer on here, which will give you fair warning.

STATEMENTS OF BENJAMIN ERDREICH, CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD, ACCOMPANIED BY BETH STAVET, VICE CHAIR; AND TONY AMADOR, BOARD MEMBER; PHYLLIS SEGAL, CHAIR, FEDERAL LABOR RELATIONS AUTHORITY, ACCOMPANIED BY JOSEPH SWERDZEWSKI, GENERAL COUNSEL; BETTY BOLDEN, CHAIR, FEDERAL SERVICE IMPASSES PANEL; TONY ARMENDARIZ; DONALD WASSERMAN; KATHLEEN DAY KOCH, SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL; AND GILBERT F. CASELLAS, CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY EMPLOYMENT COMMISSION

Mr. MICA. We will start out with the chairman of the Merit Systems Protection Board, Benjamin Erdreich.

Welcome. You are recognized.

Mr. ERDREICH. Thank you, Mr. Chairman. I would have my entire statement in the record, if I could; I will try and make an abbreviated statement.

I am pleased to be here today, and with me is my vice chair, Beth Stavet, and the third member of our board, Tony Amador. As you know, or may know, I was involved in these issues during my 10 years in Congress and served on the House Government Operations Committee, the predecessor to this committee. I appreciate the value, the oversight you are providing and pledge you my cooperation.

The MSPB adjudicatory role is to protect the merit system in Federal employment by ensuring timely, fair and neutral disposition of employee appeals of agency personnel actions, and providing guidance to agencies' employees through precedential decisions. Also, as you know, we are charged with oversight review of OPM actions and study of merit systems in the executive branch. Our board provides the only independent, neutral review of executive branch programs; and studies and reports are used by this subcommittee, as well as many others in the field.

As we take a look at the civil service system, it seems to me it is worth remembering the basic principle underlying the Civil Service Reform Act, protection of the merit system within the framework of streamlined management. From my perspective as chairman of the MSPB and based on our 1995 data, I can report that the process is working faster, more efficiently and better than ever. The impetus of this comes from our own efforts, the mandates from the President, the National Performance Review and the Congress, to create a government that works more efficiently and costs less.

The MSPB processes the file at the administrative stage in an agency personnel action. However, I think it should be emphasized, as was stated in our testimony before your prior hearing on October 26th, that based on the estimates that have come to us, only about 20 percent of all removals and the motions are appealed to MSPB. A vast number of actions we never see.

Appeals challenging agency actions are heard initially by our administrative judges in our regional and field offices, and their decisions may be appealed to our three-member board in Washington.

When I joined the board as chairman in 1993, I made timely handling of cases one of my priorities, prior to what we have achieved even as we have streamlined the agency. The 96-day processing time in FY–95 for review of appeals by the three-member board is a historic performance. The average processing time for initial decisions initiated by administrative judges is also 96 days. So, on average, it's 6 months from the time that an appeal comes to our agency to its resolution. If no board review level is sought, then the action or judgment of the administrative judge is final; and in 80 percent of the cases, that's what takes place, so in 96 days the appeal that comes to us is resolved.

This record of timely disposition is particularly significant when you consider the decrease in staff and the major increase in the number of cases since FY–93 when I came to the board. During that 3-year period, our staff has been decreased by 16 percent and during that same period, the number of cases decided has been increased by 40 percent, from 9,400 cases in FY–93 to 13,000 cases in FY–95.

Judicial review of our final decisions demonstrates that our processes are not just efficient but are proper in a court of law. In FY–95, the U.S. Court of Appeals for the Federal Circuit, our primary reviewing court, left board decisions unchanged in 94 percent of the cases appealed to it.

Some complain that the current system allows Federal employees to get two bites at the apple: filing claims based on a single dispute with more than one agency. The MSPB, the Office of Special Counsel, the FLRA and the EEOC all focus on different aspects of Federal employment disputes, and there are statutory prohibitions that prevent employees from using more than one forum to voice a complaint.

The FLRA deals with labor-management relations of agencies and labor organizations in the Federal sector, primarily issues between agencies and unions.

In the EEOC context, an employee may raise an issue of discrimination in connection with an MSPB-appealable personnel action, and our decisions may be reviewed by the EEOC on the discrimination issue, but of some 10,000 cases we see in a year, only about 2,000 or so raise a discrimination issue and most of those claims are withdrawn, dismissed or settled. Only in a few cases does a party seek to have the EEOC review a decision that we made on a discrimination allegation.

In FY–95, for example, only 140 cases were taken to EEOC from us, and the EEOC agreed with us in 139 of those cases. As the reevaluation of the civil service system goes forward, it seems to me that whatever changes to the system are ultimately proposed, the discussion should be guided by the goals of the original act, to have a fair, neutral and timely process to resolve Federal employment disputes and neutral oversight of the merit systems.

Further, it seems to me that the subcommittee's review should begin where the disputes originate, in the workplace. The successful resolution of workplace disputes benefits the involved agencies, and as importantly, the taxpayers who fund governmental activities. Your review of dispute resolutions and proposals for improvement should be a benefit for everyone.

Thank you, Mr. Chairman, and members of the subcommittee; and I would be glad to answer questions.

Mr. MICA. I thank you for your testimony, and we will withhold questions until we finish the panel.

[The prepared statement of Mr. Erdreich follows:]

United States Merit Systems Protection Board

Testimony of

Ben L. Erdreich
Chairman

U.S. Merit Systems Protection Board

Before the

Subcommittee on Civil Service
Committee on Government Reform and Oversight
United States House of Representatives

November 29, 1995

Chairman Mica, Ranking Member Moran, and Members of the Subcommittee:

I am pleased to appear before you today as the Civil Service Subcommittee continues consideration of the Federal civil service system. As one who was involved in such issues closely during my ten years on the House Government Operations Committee, the predecessor to this Committee, I appreciate the value of the oversight you are providing today. I pledge my cooperation with the House, the Senate, and the Administration as we pursue this subject in the months ahead.

The U.S. Merit Systems Protection Board (MSPB) was established by the Civil Service Reform Act of 1978 (CSRA) as an independent agency in the Executive Branch. Its adjudicatory role in the civil service system is to protect the merit systems in Federal employment by ensuring timely, fair, and neutral disposition of employee appeals of agency personnel actions and providing guidance to agencies and employees through precedential decisions.

The MSPB is also charged with oversight review of the Office of Personnel Management (OPM) actions and the study of merit systems in the Executive Branch. The Board provides the only independent, neutral review of Executive Branch programs, and its studies and reports are used by this Subcommittee as well as many others in the field. I have attached a summary of some of this significant work to my testimony.

As we take a look at the civil service system, it seems to me that it is worth remembering the basic principle underlying the CSRA--protection of the merit systems within a framework of streamlined management. A fair and neutral third-party administrative review of agency personnel decisions seems as valid today as in 1978.

From my perspective as Chairman of the MSPB, and based on our 1995 data, I can report that the MSPB process is working faster, more efficiently, and better than ever. The impetus for this clearly comes from mandates from the President, the National Performance Review, and the Congress to create a government that works more efficiently and costs less.

The MSPB process is the final administrative stage in an agency personnel action. However, it should be noted, that the overwhelming percentage of actions taken by agencies are not even challenged before the MSPB. As stated by our Director of Policy and Evaluation in your October 26, 1995, hearing: "Based on estimates provided by

knowledgeable agency officials from a number of Federal agencies, on average only 20 percent of all removals and demotions are appealed to MSPB." Appeals challenging agency actions are heard initially by administrative judges in the regional and field offices, and their decisions may be appealed to the 3-member Board in Washington.

- The 96 day-processing time in FY 1995 for second-level review of employee appeals of personnel actions by the 3-member Board is an historic performance.

- The average processing time for the initial decision issued by an administrative judge is also 96 days.

- On average, the total time from filing an appeal to final decision on review by the full Board is just over six months.

- If no Board review is sought, as is the case in 80 percent of the appeals, the initial decision becomes final--on average in 96 days.

As the attached chart shows, this record of timely disposition of appeals is particularly significant when you consider the dramatic decrease in staff and the major increase in the number of cases between FY 1993, when I came to the Board, and FY 1995.

- During this three-year period, staff decreased by almost 16 percent.

- During this same period, the number of cases decided by the MSPB increased by 40 percent (from 9,424 to 13,160 cases).

Nearly 90 percent of the cases that come to us are appeals of agency personnel actions. Retirement matters are also appealable to the Board. The rest of our caseload includes actions brought by the Special Counsel--reprisals against whistleblowers, violations of the Hatch Act, and other abuses of the merit system. A ten year history of the MSPB's workload is attached.

Our record of efficiency also has another face--the significant strain this adjudicatory pace places on the MSPB staff. The staff effort deserves recognition because it reflects their dedication and commitment to protecting the merit principles of our civil service.

Speed is, of course, only part of the picture. Judicial review of MSPB final decisions demonstrates that the Board's processes are not just efficient but that its decisions are proper and accord with the law. In FY 1995, the U.S. Court of Appeals for the Federal Circuit, the primary reviewing court of the MSPB, left Board decisions unchanged in 94 percent of the cases appealed to it.

Some have charged that the current system allows Federal employees to get two bites at the apple--thwarting agency managers by filing claims based on a single dispute with more than one agency. I am not sure what basis there is for this perception. The MSPB, the Office of Special Counsel, the FLRA, and the EEOC all focus on different aspects of the Federal employment disputes, and there are a number of statutory prohibitions that prevent employees from using more than one forum to voice a complaint. As the Supreme Court noted, the CSRA was intended to replace the "haphazard arrangements for administrative . . . review of personnel action" with "an integrated system" to balance employee interests "with the needs of sound and efficient administration." United States v. Fausto, 484 U.S. 439, 444-45 (1988).

The CSRA authorizes the Special Counsel to investigate and prosecute allegations of prohibited personnel practices and to enforce the Hatch Act. The Special Counsel prosecutes such cases and the MSPB adjudicates them. There is no duplication of function.

The FLRA deals with the labor-management relations of agencies and labor organizations in the Federal sector--primarily issues between agencies and unions. The MSPB decides appeals of personnel actions taken against individuals and, the statute precludes the FLRA from adjudicating issues that can properly be raised under an MSPB appeals procedure. 5 U.S.C. 7116(d).

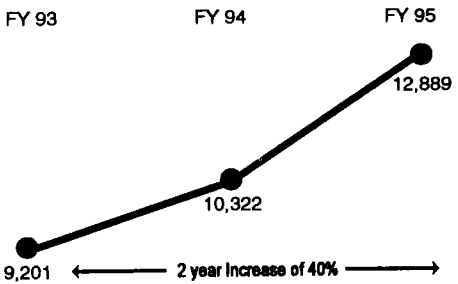
In the EEO context, the CSRA provides that decisions of the MSPB in mixed cases--those raising one or more issues of discrimination in connection with an appealable personnel action--may be reviewed by the EEOC on the discrimination issue, with possible further review by the MSPB and a Special Panel. Despite this elaborate mechanism to ensure significant protection of the civil rights of Federal workers, most allegations of discrimination raised in appealable actions are withdrawn, dismissed, or settled. The EEOC rarely disagrees with the MSPB decision in mixed cases. In FY 1995 the EEOC dismissed or agreed with the MSPB in 139 of 140 cases. The Special Panel--the final administrative stage of the mixed case procedure--has issued only three decisions since its inception, and it last issued a decision in 1987.

As the reevaluation of the civil service system goes forward, it seems to me that, whatever changes to the system are ultimately proposed, the discussion should be guided by the goals of the CSRA--a fair, neutral and timely process to resolve Federal employment disputes and neutral oversight of the merit systems.

Further, it seems to me that the Subcommittee's review should begin where the disputes originate--in the work place. The successful resolution of workplace disputes benefits the involved agencies and, as importantly, the taxpayers who fund government activities. Your review of dispute resolutions and proposals for improvement should be a benefit to everyone.

Thank you Mr. Chairman, and Members of the Subcommittee. I look forward to working with you and your staff. I am pleased to answer any questions at this time or respond to any which you would like to provide.

MERIT SYSTEMS PROTECTION BOARD CASE PROCESSING
MSPB Decisions

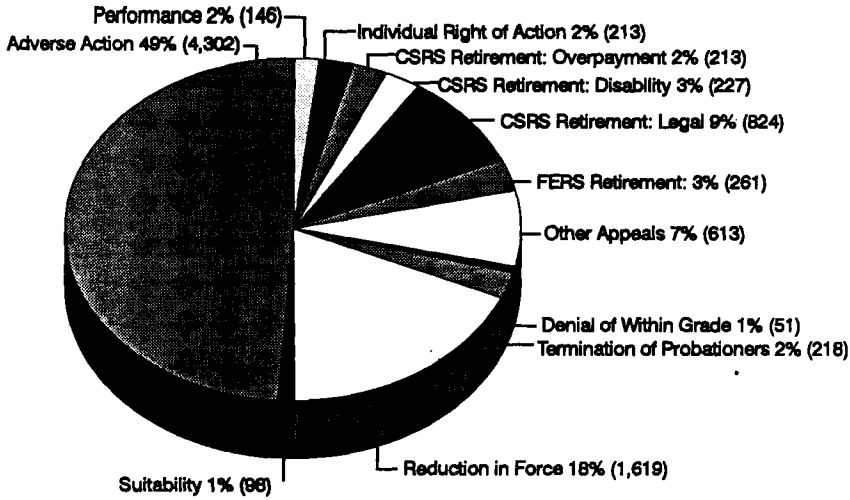


	FY 93	FY 94	FY 95
CASES DECIDED*	9,201	10,322	12,889
STAFFING	320	300	270
AVERAGE TIME TO PROCESS			
Regional and Field Offices	79 Days	81 Days	96 Days
Headquarters	131 Days	161 Days	96 Days

* Regional and Field Office decisions on initial appeals of agency actions, attorney fees, compliance, remands and Headquarters decisions on petitions for review of agency actions, attorney fees, compliance and remands

U.S. Merit Systems Protection Board
Initial Appeals of Agency Actions - FY 1995

Types of Initial Appeals--Filed*

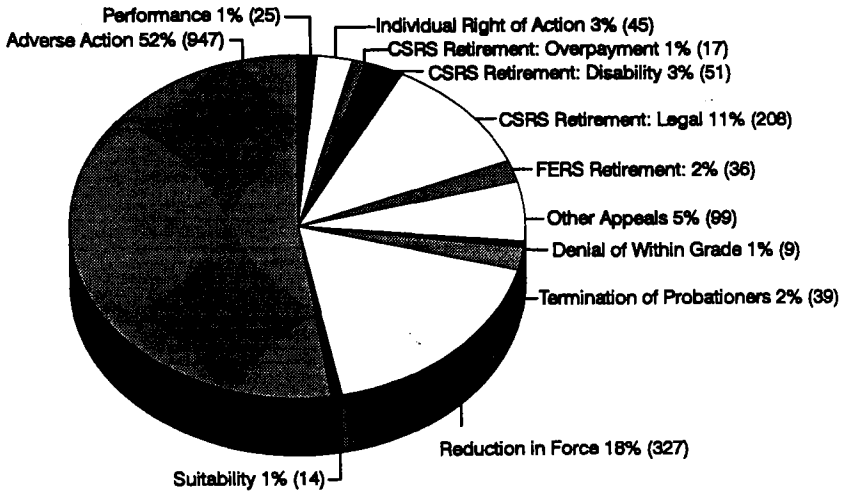


Total Number of Initial Appeals: 8,785
Percentages do not total 100% because of rounding.

* Excludes motions for attorney fees, petitions for enforcement, stay requests, and remands.

U.S. Merit Systems Protection Board
Petitions for Review (PFR's) of Initial Appeals - FY 1995

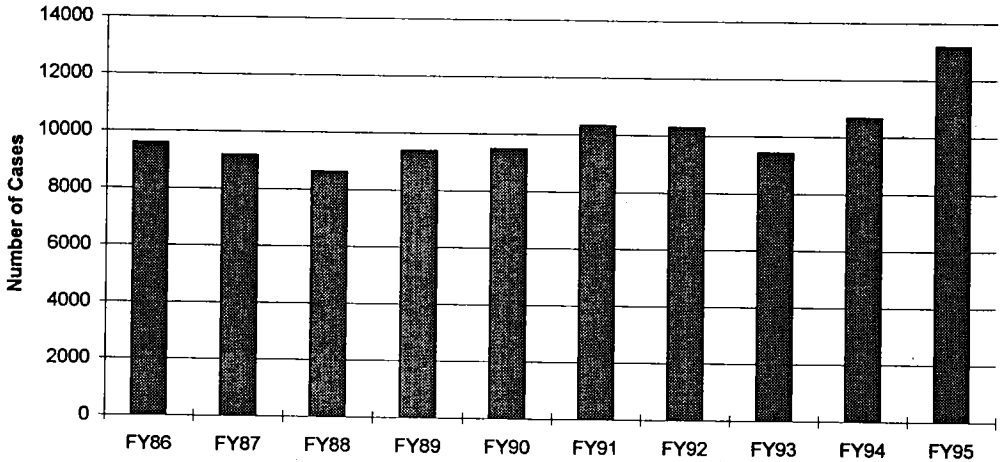
Types of PFR's--Filed*



Total Number of PFR's: 1,817

* Excludes motions for attorney fees, petitions for enforcement, stay requests, remands, original jurisdiction cases and other headquarter cases.

MSPB Decisions, FY 1986 - FY1995



	FY86	FY87	FY88	FY89	FY90	FY91	FY92	FY93	FY94	FY95
Regional/Field Offices	7,938	7,410	7,124	7,846	7,847	8,388	8,371	7,811	8,552	10,886
HQ Appellate Jurisdiction	1,620	1,733	1,484	1,510	1,582	1,891	1,894	1,576	2,031	2,225
HQ Original Jurisdiction	16	20	13	21	43	51	16	37	75	49
Total Decisions	9,574	9,163	8,621	9,377	9,472	10,330	10,281	9,424	10,658	13,160
% Change, FY to FY		-4%	-6%	+9%	+1%	+9%	0%	-8%	+13%	+23%

NOTES: (1) Regional/Field Office decisions are on initial appeals, addendum cases, and stay requests
(2) HQ appellate jurisdiction decisions are on petitions for review, reopenings, court remands, and other types of appellate jurisdiction cases
(3) HQ original jurisdiction decisions are on Special Counsel cases and other types of original jurisdiction cases

November 1995

MSPB CASE RECEIPTS - FY 1990-1995

Case Type	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995
Regional/Field Offices:						
Initial Appeals	6,795	7,677	7,361	6,938	8,775	8,785
Addendum Cases [1]	826	803	1,002	805	1,078	1,068
Stay Requests [2]	76	73	98	101	112	123
Subtotal	**7,697**	**8,553**	**8,461**	**7,844**	**9,965**	**9,976**
Board Headquarters - Appellate Cases:						
PFRs - Appeals	1,323	1,436	1,428	1,418	1,566	1,817
PFRs - Addendum Cases	149	143	186	165	173	184
Reviews of Stay Rulings	10	8	0	1	0	0
Other Appellate Cases [3]	64	59	106	73	159	159
Subtotal	**1,546**	**1,646**	**1,720**	**1,657**	**1,898**	**2,160**
Board Headquarters - Original Jurisdiction Cases [4]	Data not available	Data not available	**21**	**59**	**68**	**70**
TOTAL	**9,243**	**10,199**	**10,202**	**9,560**	**11,931**	**12,206**

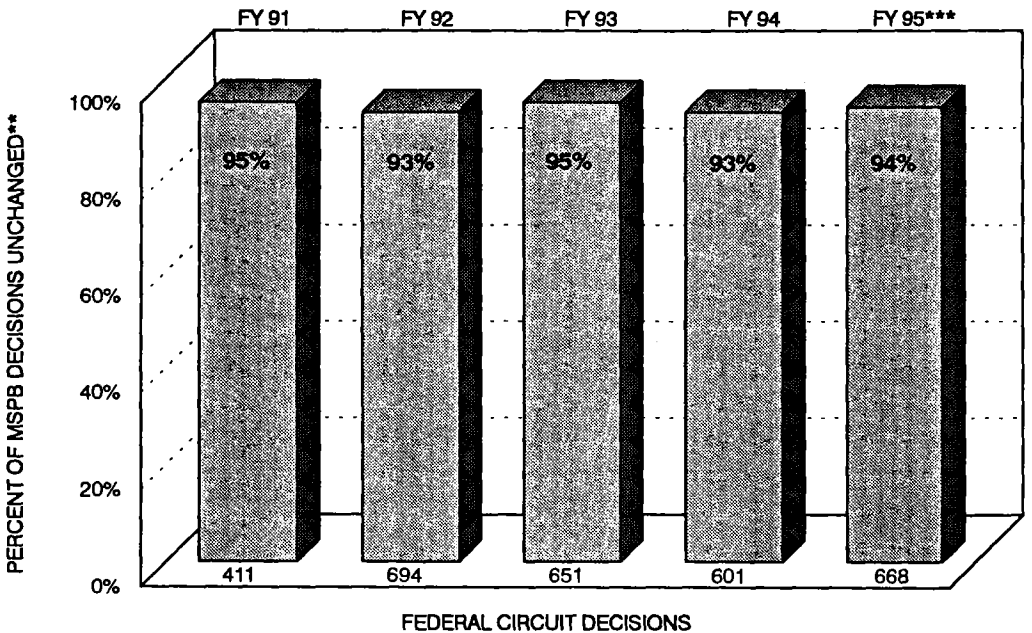
[1] Addendum cases include requests for attorney fees, requests for compensatory damages (discrimination cases only), petitions for enforcement, remands from the Board, and court remands.

[2] Stays are authorized in whistleblower cases only; appellants, however, sometimes file stay requests in non-whistleblower cases. These figures are for total stay requests filed.

[3] Other headquarters appellate cases include reopenings on the Board's own motion, OPM requests for reconsideration, court remands, compliance enforcement cases, and--in discrimination cases only--EEOC non-concurrence cases and requests to review an arbitration decision. Figures for FY 1990 and FY 1991 do not include requests to review an arbitration decision; that data is available only from FY 1992 forward.

[4] Original jurisdiction cases include Special Counsel corrective and disciplinary actions (including Hatch Act), Special Counsel stay requests, proposed actions against administrative law judges, requests to review OPM regulations, and requests for informal hearings in SES performance-based removals. Data for these cases is available only from FY 1992 forward.

MERIT SYSTEMS PROTECTION BOARD CASE PROCESSING
Judicial Review* of MSPB Decisions



* The MSPB's final decisions--either initial decisions of an administrative judge that have become final or the Board's decisions on Petitions for Review (PFRs)--may be appealed to the U.S. Court of Appeals for the Federal Circuit.

** Dismissed or Affirmed

*** Preliminary Figures

MIXED CASES [1] - EEOC/MSPB/SPECIAL PANEL DECISIONS
FY 1987-1995

Fiscal Year	MSPB Decisions Reviewed by EEOC	EEOC Dismissed or Agreed with MSPB *	EEOC Disagreed with MSPB *	EEOC Decisions Reviewed by MSPB **	Board Adopted EEOC Decision ***	Board Did Not Adopt EEOC Decision ***	Special Panel Decision
1995	140	139	1	1	1	0	0
1994	200	197	3	3	3	0	0
1993	109	108	1	1	1	0	0
1992	147	145	2	2	2	0	0
1991	136	134	2	2	2	0	0
1990	119	114	5	5	5	0	0
1989	127	126	1	3	2	1	0
1988	142	138	4	12	8	4	0
1987	390	366	24	22	21	1	1

[1] Mixed cases are those raising one or more issues of discrimination in connection with a personnel action appealable to MSPB. Discrimination claims that may be raised include discrimination based on age, color, disability, national origin, race, religion, and sex; more than one type of discrimination may be alleged in a single appeal.

* Figures in these columns total the number of decisions issued by EEOC during the fiscal year on review of MSPB mixed case decisions.

** Figures in this column are cases that MSPB reviewed during the fiscal year in which EEOC disagreed. Because the MSPB review may be of a case decided by EEOC in an earlier fiscal year, the number is not always the same as the number of cases in which EEOC disagreed with MSPB in that fiscal year.

*** Figures in these columns total the number of EEOC decisions in disagreement reviewed by MSPB during the fiscal year. Not all cases in which MSPB does not adopt the EEOC decision are certified to the Special Panel; cases are not certified if the EEOC decision was based on discrimination issues that were not before MSPB when its decision was issued.

THE MIXED CASE PROCESS, INCLUDING SPECIAL PANEL DECISIONS

As part of the Civil Service Reform Act of 1978, Congress sought to ensure that the civil rights of Federal workers received significant assurances of protection. To that end, decisions of the MSPB in mixed cases--those raising one or more issues of discrimination in connection with an appealable personnel action--may be appealed to the EEOC for review of the discrimination issue(s). If the EEOC disagrees with the MSPB decision on discrimination, the case is returned to the Board. If the Board adopts the EEOC decision, it becomes final and is then subject to judicial review in the appropriate district court.

If the Board does not adopt the EEOC decision, the case may be certified to the Special Panel for resolution. (The Board will not certify the case to the Special Panel if the EEOC decision was based on discrimination issues that were not before the Board when its decision was issued.) The Special Panel is made up of a Chairman appointed by the President, one member of the Board appointed by the MSPB Chairman, and one EEOC commissioner appointed by the EEOC Chairman. The decision issued by the Special Panel is final and is then subject to judicial review in the appropriate district court.

Since MSPB began operations in 1979, only four cases have been certified to the Special Panel. The Special Panel issued decisions in three of those cases, as follows:

1986 - *Ignacio v. U.S. Postal Service* - Agreed with EEOC

1986 - *Lynch v. Department of Education* - Agreed with MSPB

1987 - *Shoemaker v. Department of the Army* - Agreed with MSPB - This was a Chapter 43 performance case with a defense of handicap discrimination.

The fourth case certified to the Special Panel was dismissed for failure to prosecute. No cases have been certified to the Special Panel since 1987.

APPENDIX C

Special Panel

During Fiscal Year 1986 the Special Panel issued its first two decisions:

Ignacio v. U.S. Postal Service (February 27, 1986).

In a split decision, the Special Panel held that Federal agencies must consider reassignment as a reasonable accommodation for physically handicapped employees prior to taking a removal action. The majority held that the decision of the EEOC, requiring consideration of reassignment prior to removal, is reasonable and consistent with the Rehabilitation Act. The majority set forth its view of the Panel's jurisdiction in reviewing cases certified to it.

Lynch v. Department of Education (August 22, 1986).

The Special Panel in a split decision adopted the Board's opinion that removal of a handicapped employee was lawful because the agency had attempted to accommodate the employee's handicap and the medication used to treat it. The majority of the Panel held that the agency was not required to provide training to the employee as an accommodation where there was no indication that training would improve the employee's performance.

APPENDIX C
SPECIAL PANEL DECISION

During Fiscal Year 1987 the Special Panel issued one decision:

Shoemaker v. Department of the Army
(September 2, 1987)

Handicap Discrimination - Accommodation

In a unanimous decision, the Special Panel adopted the Board's decision in this case, which involved a Chapter 43 performance-based removal.

The appellant had been a Federal employee for approximately 24 years when he advised the agency that he intended to apply for disability retirement because of an ocular disability (double vision). Following this notification, the appellant received notice of proposed removal for failure to meet two critical elements of his position. The appellant's most recent performance rating had been "marginally satisfactory."

The appellant's removal was effected by the agency on May 25, 1983, and on May 31, 1983 the appellant was notified by OPM that his disability retirement application was granted. Thereafter, the appellant filed an appeal of his removal with MSPB, contending that his removal was the result of handicap and age discrimination, and that the agency had committed harmful procedural error by failing to hold the removal action in abeyance while his disability retirement application was pending with OPM.

The appellant's removal under Chapter 43 was sustained by the administrative judge, who found that the agency was under no obligation to hold the removal action in abeyance pending OPM's decision on his disability retirement application. The administrative judge also found that the agency was not required to reassign the appellant as an accommodation to his handicap; however, this was prior to the Special Panel decision in *Ignacio v. USPS*, which requires Federal agencies to consider reassignment as a reasonable accommodation for physically handicapped employees.

On review, the EEOC found that the agency's unexplained failure to hold the removal action in abeyance was the result of handicap discrimination. (No age discrimination was found.) When the case was referred to the Board, it disagreed, holding that EEOC's decision had been based solely on its reading of an internal Department of the Army regulation which was inapplicable to Chapter 43 cases and which, additionally, had been superceded by a regulation which contained no provision requiring that removal actions be held in abeyance pending a determination on a disability retirement application. Although the Board agreed with EEOC that under the Special Panel's decision in *Ignacio*, the agency had to consider reassignment, it found that the evidence indicated no positions existed to which the appellant could be reassigned.

The case was referred to the Special Panel for resolution. In its decision, the Panel agreed with the Board that the EEOC's decision was based on its interpretation of the agency's regulation and, therefore, on civil service law. It further found that the agency's regulation did not require that the removal action be held in abeyance. Thus, the Panel deferred to the Board's determination and no handicap discrimination was found.

In their separate concurring opinion, EEOC Chairman Thomas and Board Member Devaney stated that when OPM granted the appellant's application for disability retirement one week after his removal, the agency had the discretion to amend its records to show that he was on sick leave until the effective date of his retirement, and that his separation was by retirement. They noted that the agency's failure to do so resulted in an expenditure of time and money "completely out of proportion to the legal merits of the case."

IMPACT OF MSPB STUDIES

In addition to providing protection from prohibited personnel practices through its adjudicatory responsibilities, the Merit System Protection Board (MSPB) was given statutory responsibility to conduct special studies of the civil service and other merit systems in the executive branch--including oversight reviews of the U.S. Office of Personnel Management. This authority provides a neutral, independent review of Federal HRM policies and procedures on a systemic basis.

Since the Board's first special study report was issued in March 1981 to the present, policy changes and other positive actions have implemented the recommendations of the Board's studies. We have summarized a representative sample of such changes below.

The effectiveness and utility of the Board's studies cannot, however, be measured by tracking policy changes alone. In many cases, we have found that the existing policies are sound but are being poorly implemented or are not being implemented at all. That being the case, the summary includes examples of actions taken to improve policy implementation as a result of the findings of one or more MSPB studies.

Another beneficial impact of the Board's studies is that they inform the public debate on how to improve and maintain the effective and efficient operation of the civil service system. There is obvious value in providing new and useful data on important issues or problems as an aid to the decision-making process. Even demonstrating that a particular policy or program is actually working and should be retained has value. Therefore, we have also listed instances where the Board's studies have constructively influenced the direction of public policy deliberations.

Another recognition of the positive value of MSPB studies, is the receipt of the 1994 Elmer B. Staats Award for Accountability in Government, an award presented annually by the National Capital Area Chapter of the American Society for Public Administration to the individual or organization that the provided the greatest contribution to the furtherance of accountability for good government. The award citation noted that the Board's studies program has "helped to redefine boundaries and focus debate with insightful governmentwide examination of such basic issues as the changing roles of OPM and the Federal personnel offices and the effect of current recruitment, examination, and selection practices on Federal workforce quality and diversity...[and] has been a forceful advocate of accountability for effective human resources management consistent with the merit system principles."

SELECTED EXAMPLES OF THE IMPACT OF SELECTED MSPB STUDIES:

- **"Removing Poor Performers in the Federal Service" (September 1995)**

  Released as an MSPB "issue paper," this compilation of data from a forthcoming MSPB study was the basis for testimony by the MSPB's Director, Policy and Evaluation before the House Committee on Government Reform and Oversight, Subcommittee on Civil Service on October 26, 1995. The data illustrated that current statutory procedures (5 U.S.C. § 4303) for removing poor performers are seldom used for reasons based on both fact and managerial perceptions and that both will need to be addressed in attempts to make meaningful change. On a more positive note, however, the Board found that supervisors do take actions,

such as counseling a poor performer, that stop short of formal removal. The MSPB data were heavily referenced during the hearing by other witnesses and by the Subcommittee itself.

- **"Sexual Harassment in the Federal Workplace: Trends, Progress, Continuing Challenges" (November 1995)**
  "Sexual Harassment in the Federal Government: An Update" (June 1988)
  "Sexual Harassment in the Federal Workplace: Is it a Problem?" (March 1981)

  The 1981, first-of-its-kind governmentwide study of sexual harassment was initiated at the request of the Subcommittee on Investigations of the House Committee on Post Office and Civil Service. The study provided the first documented evidence of the widespread nature of the problem and provided policymakers with evidence of the personal costs and over $200 million in other costs associated with this problem (such as loss in productivity, turnover, and sick leave). The policy impact of this study--and two follow-up studies--has been dramatic. For example:

  -- As a direct result of the 1981 study, every Federal department and agency in the executive branch issued policies and implemented special programs to prevent sexual harassment. The Department of Defense, for example, specified that any employee found guilty of sexually harassing another employee would be denied security clearance and effectively barred from most employment opportunities within the Department.

  -- The Board's work is a staple in the literature and has been replicated by a wide variety of organizations and employers within and outside the Federal government. The Department of Defense, for example, developed its own survey modeled on ours for all military employees (MSPB only has jurisdiction over civilian employees in DoD).

  -- The Board's findings have been cited in precedent setting court cases and in congressional hearings.

  -- Currently, among the agencies actively pursuing new policy and program initiatives in this area based, in part, on advice and assistance solicited from MSPB are the Department of Defense, Department of Veterans Affairs, and the Departments of State, Army, Navy, and Justice. The Department of Justice, for example, has requested and is funding a follow-up survey of its workforce by MSPB that will enable the Department to more specifically identify and deal with problem areas within the Department.

- **"Leadership for Change: Human Resource Development in the Federal Government" (July 1995)**

  In the relative short time since this report has been issued, it has helped sift the focus of efforts to improve employee training and development in the Federal Government from one of simply trying to obtain more resources to one of making better use of current resources.

This report examines the paradox that although employee training and development is critical to restructuring Federal agencies to become more efficient and effective, training resources are declining. MSPB concludes, however, that the answer is not merely to allocate more resources but rather to change the way most Federal organizations allocate the resources they have. It advocates better identification of training needs and then better allocation of training funds. Included in the Board's analysis is a call for better use of staff members devoted to human resource development within the various departments and agencies.

- **"Entering Professional Positions in the Federal Government" (April 1994)**

  This report contributed to better use of the Administrative Careers With America (ACWA) examinations as a tool available for use in filling over 100 different professional and administrative Federal job categories at the entry-level. It also adds to the debate over decentralization vs. centralization of examining authority by contrasting the methods actually used to fill over 40,000 professional and administrative jobs in 1984 with the methods used to fill over 26,000 similar jobs in 1992 and demonstrating that the executive branch is already operating in a largely decentralized mode.

  The Office of Personnel Management cited the MSPB report when it took action in November 1994 to change how jobs covered by the ACWA examinations will be filled. Consistent with the Board's recommendation, standing inventories of candidates (based on the examinations) which were all but ignored by Federal agencies have been abolished, and these jobs are now individually advertised and filled, with the appropriate ACWA examination being one of several tools available to assess candidates.

- **"Temporary Federal Employment: In Search of Flexibility and Fairness" (September 1994)**
  "Expanded Authority for Temporary Appointments: A Look at Merit Issues" (December 1987)

  As recommended by MSPB, OPM revised its regulations to: (a) restrict the length of time of temporary appointments and (b) permit temporary employees to obtain health insurance benefits (by paying the full cost) after one year of employment.

  The Board's 1987 report highlighted a problem with OPM's decision to expand agencies' authority to use temporary appointments, citing increased vulnerability to violations of the merit system principles and advocated the continuation of reasonable management controls. It also noted that the changes OPM made to the regulations governing temporary appointments had changed the role of temporary employees, and that this could lead to future problems. The Board's 1994 follow-up report focused on alternative approaches to the use of temporary employees, with a special emphasis on ways to balance management flexibility, fairness to temporary employees, and adherence to the merit system principles.

- **"Whistleblowing in the Federal Government: An Update" (October 1993)**
  "Blowing the Whistle in the Federal Government: A Comparative Analysis of 1980 and 1983 Survey Findings" (October 1984)
  "Do Federal Employees Face Reprisal for Reporting Fraud, Waste, and Mismanagement?" (April 1981)

  The 1981 and 1984 "whistleblowing" studies by MSPB (updated in 1993), were used during congressional debate that resulted in strengthened protections for employees under the Whistleblower Protection Act of 1989. However, the policy benefits from this critical MSPB examination started much earlier. For example:

  -- In announcing the initiative to establish hotlines within all major Federal departments and agencies in 1981, President Reagan stated:

  > A study released yesterday reveals startling statistics that confirm much of what this Administration has said about the "national scandal" of waste, fraud, and abuse in government. . . . The Study, conducted by the Merit Systems Protection Board, also found that much of the wasteful or illegal activities have gone unreported because of the belief that "nothing would be done." This Administration means to change that attitude.

  -- Also in 1981, the Director of the President's Council on Integrity and Efficiency took seven specific actions "to respond to the MSPB findings."

- **"Workforce Quality and Federal Procurement: An Assessment" (July 1992)**

  This study and MSPB's collaboration on a follow-up study conducted by OMB provided justification for the recently enacted "Federal Acquisitions Streamlining Act" and the proposed "Federal Acquisition Improvement Act of 1995." This ground-breaking study demonstrated that well-documented problems in Federal procurement were not caused by any marked decline in the quality of Federal procurement professionals but were related to a significant increase in the complexity of the procurement process.

- **"Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response" (November 1991)**

  Based on recommended policy changes in this report:

  -- OPM changed its regulations to permit Federal employees to use sick leave to care for children or elderly family members and the President directed agency heads to work to achieve a more family friendly workplace in order to promote the efficiency of the service.

  -- An OPM report, "Balancing Work and Family Demands: The Federal Response," adopted MSPB recommendations, including one dealing with the ability of Federal agencies to use appropriated funds to help provide needed child care and elder care. Individual Federal agencies also initiated relevant efforts consistent with the Board's findings.

- **"Attracting and Selecting Quality Applicants for Federal Employment" (April 1990)**

  OPM dropped it's proposal to allow the hiring of Federal employees based on a college grade point average (GPA) of 3.0 or higher (on a 4.0 scale) after this MSPB study demonstrated that there is insufficient correlation between GPA and job success to justify the policy change.

- **"Attracting Quality Graduates to the Federal Government: A View of College Recruiting" (June 1988)**

  This study lent support to the passage, three years later, of the "Federal Employees Pay Comparability Act" (FEPCA) of 1990 which moved Federal pay setting to a locality-based system. The study called for a "market-based" approach to Federal pay, recognizing that nationwide pay increases for Federal white-collar employees are wasteful since they result in overpaying employees in some geographic areas while continuing to underpay employees in other areas.

  The report contributed to the decentralization of recruiting and examining authority within the executive branch. The overall conclusions of this study, subsequently confirmed by follow-up studies both by MSPB and GAO, were that Federal agencies were not effective in their recruitment efforts for a variety of specified reasons.

- **"Toward Effective Performance Management in the Federal Government" (July 1988)**
  Status Report on Performance Appraisal and Merit Pay Among Mid-Level Employees" (June 1981)

  The Board's 1988 study, which found that the PMRS was not functioning as intended, helped lay the groundwork for the eventual "sunsetting" of the PMRS on November 1, 1993. The Board's 1981 baseline study of how well the merit pay system established by the 1978 Civil Service Reform Act was working identified several problems that were addressed by Congress in 1984 when they replaced the merit pay system with the Performance Management and Recognition System (PMRS).

- **"In Search of Merit: Hiring Entry Level Federal Employees" (September 1987)**

  This report contributed to OPM's abolishment of the Schedule B-PAC authority and its replacement with more competitive selection vehicles. The report reviewed the operation of a special excepted service appointment authority--the Schedule B-PAC authority--that was created as an interim replacement for an competitive examination--the Professional and Administrative Careers Examination (PACE)--abolished by OPM in May 1982 under a consent decree. The report identified ways that the Schedule B-PAC authority placed merit hiring at risk.

- **"Report on the Significant Actions of the Office of Personnel Management During 1984-1985" (May 1986)**

  This was oversight review of OPM which was directly responsible for changes in several OPM policies. For example:

  - As the result of the MSPB analysis of a major OPM/OMB "grade bulge initiative" that penalized agencies through budget sanctions if their workforce profile exceeded a complex "bulge index," the use of the index was dropped.

    (MSPB demonstrated that the index did not measure poor position management, but instead it penalized agencies undergoing reductions-in-force which caused their average grade to rise. The Board found that the index resulted in commendations for agencies that were doing nothing more than expanding their staff levels which, because new hires typically start at lower grades, caused their average grade to temporarily drop.)

  - An OPM proposal to use a novel "quit rate" method for determining future Federal pay raises was dropped after an MSPB study revealed that the analysis underlying this proposal was seriously flawed.

    (Under this proposal, salaries would rise only when Federal employees quit Government in substantial numbers. If they were not quitting, it was to be assumed that they were satisfied with their pay and no upward adjustments were to be made and potential salary reductions were to be considered.)

  - The study's analysis of pay setting practices is part of the continuing discussion of pay banding for white-collar positions in the Federal Government.

  - OPM's approach to overseeing agency personnel management was modified after MSPB critiqued OPM's then current program for exercising its oversight responsibility (called Personnel Management Evaluation, or PME).

THE CONTINUING AND FUTURE POLICY IMPACT OF MSPB STUDIES:

The Vice President's National Performance Review relies on a number of MSPB reports as support for recommendations in the areas of human resources management, procurement, and workforce equity. Most of the basic goals and many of the specific recommendations have broad bipartisan support.

Among NPR policy objectives--which cite or credit specific MSPB studies--and which have been accomplished or which are underway as part of the Administration's efforts to improve Federal personnel policies and practices are the following:

- *Expand the demonstration project authority to allow projects on employee benefits and leave.*

  References the December 1992 MSPB report titled "Federal Personnel Research Programs and Demonstration Projects: Catalysts for Change."

- *Enhance Programs to Provide Family-Friendly Workplaces.*

  This includes a call for the Federal Government to be considered a "model employer" and a recommendation to allow employees to use sick leave to care for dependents--which has been implemented. Both cite the Board's November 1991 study titled "Balancing Work Responsibilities and Family Needs: The Federal Civil Service Response."

- *Strengthen the Senior Executive Service.*

  The October 1989 MSPB report titled "The Senior Executive Service: Views of Former Federal Executives," is cited as support for several recommended changes.

- *Improve Accountability for Equal Employment Opportunity Goals and Accomplishments.*

  To demonstrate the need for improved accountability, the NPR cites the October 1992 MSPB report titled "A Question of Equity: Women and the Glass Ceiling in the Federal Government," which demonstrates that lower promotion rates for women in Government are in part due to the influence of non-merit factors such as persistent and unfounded stereotypes.

- *Strengthen Systems to Support Management in Dealing with Poor Performers.*

  The NPR draws heavily from the MSPB's April 1988 report, "Federal Personnel Policies and Practices: Perspectives from the Workplace," to define the problem.

- *Reform the General Schedule Classification and Basic Pay System.*

  The NPR relies on the November 1989, MSPB report, "OPM's Classification and Qualification Systems: A Renewed Emphasis, A Changing Perspective," to describe the need for change.

- *Create a Flexible and Responsive Hiring System.*

  NPR relies on two MSPB reports, the October 1989, "Delegation and Decentralization: Personnel Management Simplification Efforts in the Federal Government" and the April 1990, "Attracting and Selecting Quality Applicants for Federal Employment," to provide justification for the need to change Federal recruitment and hiring practices.

- *Decentralize Federal Personnel Policy.*

  The recommendation to decentralize recruiting and examining authority draws support from references to the MSPB's August 1993 report, "Federal Personnel Offices: Time for Change?"

- *Simplify the Procurement Process by Rewriting Federal Regulations--Shifting from Rigid Rules to Guiding Principles.*

  The NPR references the conclusions from the July 1992, MSPB report, "Workforce Quality and Federal Procurement: An Assessment," to support the need to take workforce issues into account in examining the procurement process.

Mr. MICA. I would like to recognize Phyllis Segal, chair of the Federal Labor Relations Authority at this time.

Ms. SEGAL. Thank you, Mr. Chairman.

Good morning, members of the committee. I appreciate this opportunity to appear before you today and will be submitting for the record our full statements and taking as little of your time as possible in this opening.

I would like to take a moment, though, to introduce those who are here with me. Joseph Swerdzewski, FLRA's general counsel, is sitting to my right; and he is sitting at the table because he heads one of the independent components within our agency and is prepared to answer your questions if you have any for him. Betty Bolden, who chairs another independent component within our agency, the Federal Service Impasses Panel, is also sitting with us at the panel.

Behind us, we have also brought Tony Armendariz, who has been a member of the Authority, the adjudicatory panel, since his appointment in 1989; and Donald Wasserman, whose appointment as the third member of the panel is currently pending before the Senate.

I would like to emphasize in these opening remarks four primary points, and one I have already illustrated, and that's that the Federal Labor Relations Authority operates as three agencies consolidated into one. We are already acting—operating as a consolidated agency brought together by the Civil Service Reform Act in 1978. Prior to that time, the functions that we performed for Federal sector labor relations were divided among other places in the Government. We were consolidated to bring them into one integrated program.

The three components are the Authority, which is a three-member panel that decides cases in four subject areas: the negotiability of collective bargaining proposals; exceptions filed by agencies or unions, not individuals, to grievance arbitration awards; appeals by agencies or unions from unfair labor practice decisions; and appeals concerning representation issues—determinations of representation petitions.

The Office of General Counsel, which accounts for over half of our agency, is headed by the general counsel and the staff—he and the staff he directs investigate, prosecute, settle and litigate OPM claims. In addition, it carries out responsibilities in the representation area delegated to it by the Authority.

The Federal Service Impasses Panel resolves impasses between Federal agencies and unions representing Federal employees, arising from negotiations over conditions-of-employment issues. This unique organizational structure reflects the FLRA's emphasis on institutional relationships as opposed to individual employee appeals.

I will tell you that our consolidation brings certain challenges and also carries with it important benefits, which brings me to my second point.

The collective bargaining program administered by the FLRA certainly involves Federal employees, but the focus of our work is not Federal employee appeals. To understand our mission and role,

it's important to recognize that the FLRA's focus is on the Federal workplace disputes and institutional relationships.

Federal employee appeals account for a relatively small percentage of the types of disputes we resolve. Examples of others are representation unit determinations, bargaining disputes, and alleged unfair labor practices involving institutional issues, such as the work environment of Federal employees.

In short, the matters we address are different in several respects from the matters addressed by the other agencies on this panel, and that's evident in the jurisdictional boundaries. First, there are only two limited opportunities for any jurisdictional overlap between these agencies, and you can count on one hand the number of times overlap has actually occurred in the past several years.

Second, with respect to the subcommittee's express concern with so-called "poor performers," most of the disputes addressed by the FLRA do not address performance issues. None involve performance-based actions arising under Chapter 43 and Chapter 75.

And third, with respect to the limited potential for overlapping conflict, there are already a number of mechanisms in place to deal with those, including some fairly specific and directive statutory provisions.

My point is not that our systems and structures can't be made better and my point is not that there isn't confusion. I just think it's important that we be guided by a factual understanding of some of the crucial distinctions between what the different agencies address.

My third point is that it's—talking about the costs of any type of reform is very important and even significant costs may well be worth expending, if they produce great benefits. But even minimal costs aren't worth it if they produce no benefits at all. I believe that—I agree completely with Chairman Mica's opening comments to these hearings that the objective is not to make things different but to make things better.

A few comments on the types of costs that I would urge be considered in this whole discussion.

First are the costs of transition. The costs of any structural reform will include transitional disruption, and the costs associated with disrupting the work of third party dispute resolvers will be higher, and perhaps at its highest when the rest of government itself experiences reorganization-related disputes. To paraphrase an exchange at one of the earlier hearings, one witness said, "An injured physician is not in any shape to conduct an operation."

An additional cost to consider relates to the design of a new structure. If the design contemplates breaking apart the consolidation that already exists in the Federal Labor Relations Authority, it will carry its own distinct cost, its own distinct questions, including the division of responsibility over representation areas, which are now handled in an integrated way, and including, most important—and I think this will be of interest to the committee because of the prior questions it raised, we operate with an agency-wide emphasis on alternative dispute resolution, introducing collaborative approaches to resolving workplace problems, frankly, before they become cases.

My fourth and final point is to add one principle to the ones—to recommend adding one principle to the ones that the chairman recited at the beginning, each one of which I agree with, and that's the principle that any reforms to the system and structure for resolving Federal workplace disputes should be clearly the goal of reducing the costs of such conflict. That's what's motivating change in the private sector.

I come from a background of working on this in the private sector. That's what's motivating what we are doing at the Federal Labor Relations Authority. I will tell you, and perhaps in questions and answers, have an opportunity to expand upon it, that our emphasis on reducing costs in the workplace conflict are having very powerful results. It can work if you put your minds to it.

Thank you. I look forward to answering your questions.

Mr. MICA. We thank you for your testimony.

[The prepared statement of Ms. Segal follows:]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

STATEMENTS OF

PHYLLIS N. SEGAL, CHAIR

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JOSEPH SWERDZEWSKI, GENERAL COUNSEL

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BETTY BOLDEN, CHAIR, FEDERAL SERVICE IMPASSES PANEL

of the

THE FEDERAL LABOR RELATIONS AUTHORITY

before the

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

SUBCOMMITTEE ON CIVIL SERVICE

U.S. HOUSE OF REPRESENTATIVES

HEARING ON

"STREAMLINING THE FEDERAL APPEALS PROCESS"

November 29, 1995

STATEMENT OF PHYLLIS N. SEGAL, CHAIR
FEDERAL LABOR RELATIONS AUTHORITY

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to appear before you to testify on behalf of the Federal Labor Relations Authority (FLRA) about "streamlining the federal appeals process." My testimony will emphasize the importance of this effort in the context of reducing the costs of federal workplace disputes and increasing the effectiveness and efficiency of our government.

I would like to take a moment to introduce those who are here with me today. First, Tony Armendariz, who has been an Authority Member since his appointment in 1989. The third seat on the Authority is currently vacant, but we hope it will soon be filled by Donald Wasserman, whose nomination by the President is currently pending in the Senate. Joseph Swerdzewski, the FLRA's General Counsel, is sitting at the table with me, as is Betty Bolden, the Chair of the Federal Service Impasses Panel (the Panel).

As I will explain shortly in more detail, both General Counsel Swerdzewski and Chair Bolden lead independent components within the FLRA. At the Committee's request, I will make the opening statement for all three of these components, in my role as the FLRA's Chief Administrative and Executive Officer. I note, however, that both General Counsel Swerdzewski and Panel Chair Bolden have accepted the Committee's offer to submit written testimony. They also are available to answer the Committee's questions concerning their particular components or any other issue.

THE FLRA

The stated focus of today's hearing is the appeals process for federal employees. At the outset, I'd like to clarify that federal employee appeals are only one aspect of the FLRA's responsibilities; indeed, these account for a relatively small percentage of the types of disputes we resolve. First, agencies and unions, and only rarely federal employees, bring issues to be resolved to the FLRA. Second, only some of these issues are "appeals." As I will explain, the focus of the FLRA's work is really federal workplace disputes and institutional relationships, as opposed to the appeals process for federal employees.

Because this concept of "institutional" as opposed to "individual" relationships may not be readily understood, let me try and bring it into focus. When the Committee invites the presidents of the government's largest unions to testify, it is looking to them as "institutional" representatives. The Committee seeks their testimony with the confidence that the witness is not speaking for his or herself alone, but on behalf of the thousands of employees they represent. This same principle applies in the federal workplace between agencies and unions. The FLRA, operating as a "neutral," administers this institutional relationship.

The FLRA's mission and the unique organizational structure reflects this emphasis on institutional relationships. It was created in 1978 as an independent agency to administer the labor-management relations program for over 2.1 million non-postal federal employees world-wide, over 1.3 million of whom are now exclusively represented in more than 2,200 bargaining units. The FLRA's statutory responsibility is to provide leadership in establishing policies and guidance relating to federal sector labor-management relations and ensure compliance with the Federal Service Labor-Management Relations Statute.

This Statute gives federal employees the right to "participate through labor organizations of their own choosing in decisions which affect them." 5 U.S.C. 7101(a)(1). The key word here is "labor organizations." The only rights of individual employees addressed in the Statute concern, on the one hand, forming, joining or assisting labor organizations (or refraining from doing so), 5 U.S.C. 7102, and on the other, exercising management authority on behalf of an agency. 5 U.S.C. 7106. The Statute, in short, addresses the rights and duties not of "individuals" *per se*, but of individuals within the context of labor organizations. It defines the relationship between two institutions -- the agency and the union representing the agency's employees. The FLRA's charge is to ensure that this relationship operates to "safeguard the public interest" and "contribute to the effective conduct of public business," and that it "facilitates and encourages the amicable settlements of disputes" 5 U.S.C. 7101(a)(1)(A), (B), (C).

The FLRA fulfills these statutory responsibilities primarily through three independent operational components.[1] Before the FLRA was created in 1978 by the Civil Service Reform Act, labor-management relations in the federal sector was governed by Executive Order and its administration was fragmented among various parts of the government. Today's FLRA represents the federal government's consolidated

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[1] The FLRA also supports two other components which were established by the Foreign Service Act of 1980: the Foreign Service Labor Relations Board, which resolves labor-management issues within the foreign service workforce, and the Foreign Service Impasses Disputes Panel, which resolve impasses within the foreign service.

approach to its labor-management relations. It is, in effect, "three agencies consolidated in one." Because it is important to understand this existing consolidation as the Committee considers possible alternative structures, I will briefly summarize the functions of each of these three independent operational components. More detailed discussions of the Office of General Counsel and the Federal Service Impasses Panel are included in General Counsel Swerdzewski's and Chair Bolden's written statements.

The Authority: The Authority is a quasi-judicial body with three full-time Members (one of whom is Chair) who are appointed by the President with the advice and consent of the Senate. In addition to my responsibilities as the Chief Executive and Administrative Officer of the FLRA, I serve as Chair of the Authority. This component of the FLRA is the first adjudicatory level to decide cases concerning the negotiability of particular collective bargaining agreement proposals. We also decide "exceptions" (the equivalent of appeals) filed by agencies or unions to grievance arbitration awards. In addition, the Members and I resolve allegations of unfair labor practices (ULP), deciding agency and union appeals from decisions and recommended orders issued by our Administrative Law Judges on ULP complaints prosecuted by the FLRA's Office of General Counsel.

Finally, we decide the appropriateness of units for labor organization representation. Pursuant to our delegation, the initial processing of representation petitions and the conduct of elections is handled by the FLRA's seven Regional Directors. Since the Regional Directors are supervised by the General Counsel, this delegation illustrates one aspect of the integration between the Authority and the Office of General Counsel made possible by our consolidated structure. Specifically, rather than require thousands of agencies and bargaining units throughout the country to bring their petitions to the Authority's sole office in Washington, D.C., or create a separate field structure to process them, the regional offices supervised by the General Counsel carry out this responsibility.

The success of this integrated approach to representation issues is evident in the numbers. Last year, 95% of the 600 representation petitions filed with the FLRA were determined at the local level by the Regional Directors without appeal to the Authority. I have no doubt that this is due in large part to the nature of the ongoing interactions between our regional offices and the parties, as described in General Counsel Swerdzweski's testimony. As I will note later, one of the challenges about any restructuring of the current system is ensuring that there continues to be an adequate field structure to address the representation process, and avoiding representation issues becoming unnecessarily adversarial and costly.

The Office of General Counsel: The FLRA's Office of General Counsel (OGC) is the independent investigative and prosecutorial component of the FLRA, directed and managed by a General Counsel who is appointed by the President with the advice

and consent of the Senate. In addition to investigating, making decisions about prosecuting, and litigating ULP claims, the Office of General Counsel has statutory authority to settle unfair labor practice charges. As you will learn from General Counsel Swerdzweski's testimony, the OGC has developed a highly effective approach to assist parties in resolving more of their disputes on their own, without litigation. Finally, as I've just explained, the General Counsel also supervises the Regional Directors in carrying out the responsibilities delegated to them by the Authority to process representation petitions and supervise elections. The Office of General Counsel employees represent over 50% of the FLRA's total workforce.

The Federal Service Impasses Panel: The Federal Service Impasses Panel consists of seven Presidential appointees who serve on a part-time basis, and are supported by a small full-time staff. The Panel resolves impasses between federal agencies and unions representing federal employees arising from negotiations over conditions of employment under the Statute and the federal Employees Flexible and Compressed Work Schedules Act. If bargaining between the parties, followed by mediation assistance, proves unsuccessful, the Panel has the authority to recommend procedures and to take whatever action it deems necessary to resolve the impasses. The Panel, in short, is the last step in federal sector collective bargaining -- the substitute for the strike and lockout in the private sector.

STREAMLINING: HOW TO DO IT BETTER, NOT JUST DIFFERENTLY

"Streamlining" the process for deciding federal employee appeals -- or more, broadly, for resolving federal workplace disputes -- is, like motherhood (fatherhood) and apple pie, clearly desirable. Indeed, it is something that has been widely endorsed by many of the witnesses who have recently testified before this Committee. The word "streamlining," however, carries a multitude of different meanings and methods. As Chairman Mica said when he convened these Civil Service Reform hearings, "We need to do things not merely differently, but better." Aiming for "better" requires being guided by a carefully defined purpose. Without clarity of purpose, the risk is making change for the sake of change -- and frankly, the millions of federal employees who rely on the current system, and the taxpayers who pay for it and will pay for change -- deserve better.

"DOING THINGS BETTER" REQUIRES DETERMINING WHAT NEEDS TO BE ACCOMPLISHED AND HOW BEST TO DO IT: THE COSTS AND BENEFITS OF RESTRUCTURING

Before we expend taxpayer resources on reforming by restructuring the current process, it is important to be clear on the goals we seek to achieve, and confident that any new structure will achieve them. Even significant costs may be worth expending if they result in great benefits. However, even minimal costs may be too high if they produce no real benefit at all.

Some of the considerations that will affect the cost of restructuring pertain to all of the agencies presently involved in addressing federal workplace disputes. For example, restructuring the current system will inevitably cause some level of interruption of services during the period of transition. The "costs" of such interruption are likely to be highest during a period when the rest of government is also in transition and reorganization-related issues are on the rise. It is, in short, during these times that the services of third-party dispute resolvers are needed most. To paraphrase an exchange at one of the Committee's earlier Civil Service Reform hearings, "an injured physician is not in any shape to conduct an operation." Therefore, the timing of any structural change is important.

Other considerations will be unique to particular agencies. With respect to the FLRA, for example, if a new structure is contemplated that dismantles the combination of functions currently consolidated within our one agency, it will carry distinct costs that must be assessed. Our current consolidation carries with it certain challenges, and produces important benefits. I've already described how the division of responsibilities between the Authority and Office of General Counsel in the representation area serves our customers well.

Another benefit resulting from our current structure is the FLRA's cross-component emphasis on alternatives to traditional adversarial litigation. These activities are directed toward reducing litigation in the federal service (and its attendant costs -- both to the parties and the FLRA) by helping parties resolve more of their own disputes without third-party assistance. While these alternative approaches to resolving cases -- which are praised by management and union representatives alike -- are still at their inception, early indications show they work. There are a multitude of anecdotes about agencies saving litigations costs and increasing productivity and customer service by using these alternative problem-solving approaches.

The Authority, Office of General Counsel and the Panel have just taken a further step to build on this by creating a unified cross-component "conflict resolution / labor-management collaboration program." This program will strengthen our

interest-based dispute resolution services in pending unfair labor practice, representation, negotiability and impasse bargaining disputes. It will also assist labor and management in developing collaborative relationships and constructive approaches to conducting their relationship. This is one area where we need to avoid structural changes that make the system less effective rather than better.

Considerations such as these suggest some of the questions that should be part of any serious discussion about improving the structure of our present workplace dispute resolution agencies -- particularly if what's contemplated breaks apart the FLRA. These questions include: How do we maximize the development of labor-management collaboration and conflict resolution as an alternative to litigation, and is it important to have a unified program charged with leadership in this area? How can we most efficiently make appropriate unit determinations, and is it important to have a unified program to do so? How do we integrate programs and processes that address individual rights, on the one hand, and institutional relationships, on the other? If changes are to be made, what is the best time to make them?

Thoughtfully addressing these and other questions will make it possible to avoid implementing reforms that result in inadvertent and excessive costs. But even more important than considerations about costs, I believe, is to consider how reform can achieve real benefits. Which means it is crucial to understand what benefits we aim to achieve.

WHAT ARE THE GOALS TO BE SERVED BY REFORM?

It appears that some of the current interest in reforming the workplace dispute resolution agencies by restructuring -- and, in particular, consolidating -- them is prompted by the goal of eliminating a perceived "overlapping jurisdiction" problem. This problem, I have heard suggested, gives federal employees more than one forum in which to bring their complaints -- two or more "bites at the apple." While I recognize that this perception is widely touted, it is crucial to pin it down -- because unless we understand how and why this is a problem, we are unlikely to solve it. Let me offer some relevant facts to inform this understanding. There are only two limited opportunities for this type of jurisdictional overlap between the FLRA and other affected agencies. In addition, there are already a number of mechanisms at work that curtail an employee from taking more than one path to register his or her complaint.

Another potential goal that's been suggested has to do with preventing "poor performers" from using their statutory rights and the adjudicatory process as both a shield and sword to avoid discipline and/or adverse action. As to this, again, some facts might help. Most of the disputes addressed by the FLRA do not involve performance issues; indeed, as I mentioned above, only a small portion of our workload deals with complaints concerning individual employees.

If either of these are the "goals" motivating our attention to reform, it's not clear how much can be gained by consolidating the FLRA with other agencies. My point is not that there are no reasons to reform our dispute resolution system (including its structure). To the contrary, I am confident we can make it better. I suggest, however, that any effort to improve this system be aimed more clearly and effectively at the goal of reducing the costs of federal workplace conflict. This, obviously, is a more ambitious challenge. But the benefits to be realized are real.

These "costs of conflict" begin with what is spent on litigation and adjudication -- reducing this is highly desirable. They also include what we lose when problems are not quickly or adequately resolved -- because this prevents managers, unions and the employees they represent from spending time and resources on accomplishing the agency's work and providing high quality customer service to the taxpayer.

Reforms designed to achieve this goal will, if they succeed, produce important benefits. But such reforms will require something different than simply moving boxes around on an organizational chart.

THE GOAL OF REDUCING THE COSTS OF RESOLVING FEDERAL WORKPLACE DISPUTES

Over the last two years, the FLRA has implemented three strategies to reduce the costs of conflict in the federal workplace, and our efforts are beginning to show results.

We are training federal workers -- managers and union reps -- in interest-based problem-solving skills and other alternatives to the traditional adversarial approach, to help them resolve conflict themselves, without a third-party. When they can't resolve their problems themselves, we are intervening in their disputes to help. And where resolution requires adjudication, we are taking steps to bring greater clarity and stability to the law, so that it can serve as a more dependable guide in the future.

The FLRA's responsibilities in the representation area serves as a paradigm that illustrates these three strategies at work -- particularly important at this time because questions about which employees are in a bargaining unit and which union an agency must bargain with proliferate when government is reorganized and downsized. We're using a three-pronged strategy to tackle these questions. First, the FLRA is teaching parties to resolve some of these questions themselves through interest-based bargaining. Last year we conducted several hundred of these training programs for thousands of federal employees nationwide. Second, we're intervening in their disputes when they can't do it alone. For example, after over 65 separate representation petitions were filed concerning the representation

rights of over 40,000 employees in an agency reorganized within the Department of Defense, the FLRA's General Counsel worked with the parties to reach practical legal solutions to their problems. Over 50 of the petitions were withdrawn as a result and the parties were able to proceed quickly to an election on the rest.

Third, we're taking steps to simplify our regulations and bring greater clarity and stability to our law. Thus, we've recently proposed revamping our representation regulations by, for example, cutting the number of petitions from 7 to 1, expediting election procedures and integrating alternative dispute resolution into the process. Another example is in case law: after soliciting and considering party and amicus briefs, the Authority set forth a new approach for determining successorship in the federal sector. This is particularly important so managers and employees have a clear understanding of their bargaining responsibilities after an agency is reorganized.

In addition to the representation area, we are also working to put these strategies into action in the negotiability process. We're integrating alternative dispute resolution techniques into negotiability disputes; attempting to lay out clearer legal doctrine that will guide the parties' negotiations when they sit down at the table; and to reduce the procedural problems that delay resolving duty to bargain questions. Chair Bolden's testimony highlights how we are reducing the costs of conflict in the bargaining impasse resolution area. Indicators of success here include the 12% reduction in cases over the last year where the Panel was required to mandate the terms of a collective bargaining agreement, because the parties could not reach agreement themselves.

We are also working to apply these strategies in the unfair labor practice area. The General Counsel's testimony details some of the results of these strategies. Indicators that they are working include the 28% reduction in unfair labor practice charges filed over the last two-years, as well as the high percentage of managers and employees who say that labor-management collaboration is improving their relationships. We also are encouraged by the early results from our pilot settlement project for cases before our Administrative Law Judges: in the three months since this pilot started, the parties have agreed to settle instead of go to trial in 76% of the cases where our settlement attorney has intervened to assist them. The thirty-two trials that thereby became unnecessary translate to money saved for the litigants and for the FLRA (and therefore, for the federal taxpayer), and a resolution likely to be more durable because it was agreed to rather than imposed.

This is just a sampling of the ways the FLRA is putting these three strategies to work to reduce the costs of conflict between managers, unions and the employees they represent. Our experience gives me confidence that if we set our sights on reducing the costs of federal workplace disputes, we can increase the

effectiveness and efficiency of our government -- though not by simply "moving the boxes" to restructure our agencies.

CONCLUSION

As the Committee knows, Congress, through the appropriations process, appears likely to ask the Administration to look at these issues. We welcome the opportunity to work with the Administration and Congress in this endeavor -- to design and implement ways to not just do things differently, but to do them better.

Mr. Chairman, this concludes my prepared remarks. My colleagues and I look forward to working with you and the Members of the Committee and welcome the opportunity to answer any questions you and the Members of the Committee may have.

WRITTEN STATEMENT OF JOSEPH SWERDZEWSKI
GENERAL COUNSEL, FEDERAL LABOR RELATIONS AUTHORITY

Mr. Chairman and Members of the Committee:

It is my pleasure to appear before you today as the General Counsel of the Federal Labor Relations Authority.

OFFICE OF THE GENERAL COUNSEL

The FLRA's Office of the General Counsel (OGC) is significantly different, in many important respects, from General Counsel offices in other federal agencies. In most ways it is closer in function to a District Attorney than to the corporate legal advisor function performed by most General Counsels. The OGC is the independent investigative and prosecutorial component of the FLRA. The General Counsel is an independent prosecutor appointed by the President with the advice and consent of the Senate. He has statutory authority to investigate, settle and prosecute unfair labor practice (ULP) charges that are filed pursuant to the Federal Service Labor-Management Relations Statute, and to develop policies and procedures to process these charges. This past year more than 6000 ULP charges were filed by federal sector labor unions, agencies and individual employees. The General Counsel decides appeals of decisions by OGC Regional Directors to dismiss unfair labor practice charges.

The General Counsel also has responsibility for the processing of representation petitions. The processing of representation petitions includes making determinations regarding the appropriateness of bargaining units, and conducting and supervising elections for the certification of labor organizations as the exclusive representative of a bargaining unit. This past year more than 600 representation petitions were filed for processing by the OGC. More than 95% of all representation cases are handled by the OGC without appeal to the Authority.

The General Counsel manages, directs, and supervises all employees of the OGC, which comprise more than 50% of the entire staff of the FLRA. The majority of these employees are located in the seven regional offices of the OGC. This responsibility includes supervision of the Regional Directors in the performance of their delegated responsibility to process representation petitions and elections.

FEDERAL SECTOR LABOR RELATIONS

Over 95% of all unfair labor practices in the federal sector are filed by institutions, namely, federal unions or federal agencies. Only 5% are filed by individual employees. The vast majority of all unfair labor practices are filed to address statutorily conferred rights of these institutions, predominately, the right to bargain or the right to perform representational functions on behalf of a labor organization. These charges are quite often filed because of a historical labor relations model which is grounded in the traditional adversarial approach. A second major basis for the filing of unfair labor practices is the nature of the relationship between the parties. Frequently in the federal sector, unfair labor practices are filed as a reflection of problems in the underlying relationship between labor and management. If there are problems based on lack of trust or other relationship issues, such issues will be interwoven with the legal issues set forth in the unfair labor practice charge. We seek to investigate and prosecute violations of the law, as well as be responsive to the needs of the parties for solutions to improve their labor-management relationship. Improved labor-management relations have a positive impact on the entire human resource management system in the federal government.

Another feature of federal sector labor relations is that the FLRA has repeated dealings with the majority of the parties who regularly file unfair labor practice charges. Indeed, the OGC has had ongoing dealings with various facilities for the entire life of the program. This is due in large measure to the constant turnover that occurs in both management and union personnel. Understandably, this turnover results in a continual reexamination of the parties' respective rights and obligations under the Statute. Thus, through the processing of unfair labor practice charges the OGC has a keen awareness of the parties' evolving relationships, issues and concerns.

Given the factors described above, the OGC is very different than its private sector counterpart. Essentially, the FLRA has responsibility for the regulation of a labor-management relations program with only one employer. While the various agencies have different responsibilities and missions, they are all instrumentalities of the federal government. FLRA decisions must not only protect the statutory rights of the parties involved, but must also further the effectiveness and efficiency of the government. To serve the purposes of the Statute, the FLRA must not only see that the right thing is done for the parties to the dispute, but also for the taxpayers. This requires innovative approaches to disputes between labor and management which will not only resolve the immediate legal issue, but also will form the basis for future improvement of the relationship between labor and management. A sound and productive labor-management relationship greatly assists the development of a more effective and efficient government.

OFFICE OF THE GENERAL COUNSEL INITIATIVES TO REDUCE THE COSTS OF CONFLICT AND IMPROVE SERVICE

To fulfill its statutory mission to administer the federal sector labor-management relations program and foster collaborative problem solving approaches to labor-management disputes, the OGC has developed a series of policy initiatives.

Prosecutorial Discretion Policy

Under the Prosecutorial Discretion Policy issued by the General Counsel in May of 1994, Regional Directors of the FLRA are now authorized to apply established criteria to dismiss otherwise meritorious unfair labor practice charges when litigation would not effectuate the purposes and policies of the Statute. The thrust of this policy is to formulate a consistent approach to dealing with ULP charges which are technical violations of the law, however, given the nature of the charge, or the actions of the parties after the filing of the charge to possibly cure or moot the violation, do not warrant prosecution. This policy sets forth the criterion that is to be followed in determining which cases should be prosecuted and which should not.

In the past, significant resources of the FLRA were spent litigating cases which were technical violations of the law, but were of no value to the parties, did not improve their relationship, and most importantly, did not further the purposes of the Statute. In the first year this policy was in effect, 75 cases which in the past would have been litigated were dismissed. With issuance of this policy, the OGC is insuring that our resources are concentrated on the litigation of important legal issues, thereby enhancing the effectiveness of the Statute.

Settlement Policy

Simultaneous with the issuance of the Prosecutorial Discretion Policy, a new OGC Settlement Policy was instituted. It provides greater discretion to Regional Directors in approving settlements of unfair labor practice complaints. The aim of this policy is to provide both a viable process and timely opportunity for labor and management representatives to participate collaboratively in the development of resolutions of violations of the Statute. The prior settlement approach had been based on the issuance of a proposed FLRA settlement agreement, which the parties negotiated from in reaching resolution of the ULP. In many cases, this resulted in the parties negotiating with the FLRA to settle their dispute instead of with each other. Under the new policy, rather than negotiate with the FLRA, the parties are responsible for the settlement and the FLRA only serves to assist the parties. If the parties are unable to resolve their own dispute, the OGC will then set the terms of the settlement and proceed with preparation for litigation. This approach has resulted in the development of new, creative, and often more rigorous settlements of unfair labor practice complaints. Over the past year that this policy has been in effect, there has been a 25% decrease in cases litigated.

Facilitation, Intervention, Training and Education
In accordance with the FLRA's increasing emphasis on alternative dispute resolution and the fact that in many instances a motivating factor in the filing of unfair labor practice charges is the relationship between the parties, the OGC developed programs to assist the parties in the resolution of their underlying relationship issues in addition to the legal issues represented by an individual charge. The objectives of these programs, which involve the use of facilitation skills, intervention techniques, and training and education, are: (1) to develop the parties' interest-based problem solving skills, and (2) to assist them in the design of permanent alternative dispute resolution systems. These programs also include training on the rights and obligations of the parties under the Statute. Through these efforts, we are seeking not just to resolve the existing dispute but to develop ways for the parties to prevent and if not, resolve any future disputes that arise without third party assistance.

This past year we provided over 350 programs to federal sector agencies and unions. In order to evaluate the effectiveness of these programs, we conducted a survey of program participants. The survey revealed that 75% of the participants believed that the program led to improved labor-management relations at their facility. Approximately 33% stated that as a result of the program, there was a reduction in the filing of unfair labor practices at their facility. To date, OGC intervention-type programs targeted those facilities which had historically experienced high rates of ULP filings. We have realized successful results from these programs. For example, one facility which had over 160 ULP charges filed in a single year, had an 89% reduction in ULP filings and an 82% reduction in grievance filings after intervention programs were provided by the FLRA. Also, due in part to these programs, the OGC has seen a 28% decrease in filings of ULP charges since 1993. For the prior 10 years, ULP charge filings had increased an average of 10% per year.

Government Reorganization
The OGC has a critical role in processing and deciding issues concerning the representation of employees by federal sector labor unions. As referenced in Chair Segal's testimony, the OGC has taken a very proactive approach to assisting the parties in dealing with government reorganizations. For example, over the past two years there have been a number of large reorganizations within the Department of Defense which involved thousands of employees and hundreds of bargaining units. Rather than handling each one of the many representation petitions that could be filed as an independent matter, we have adopted a collaborative problem-solving approach to reorganizations. This approach involves bringing all the parties at interest together to participate in an interest-based process to identify and address the respective representation issues brought about by the proposed reorganization. Using this approach, we have successfully guided parties through major reorganizations involving the Defense Commissary Service, Defense Finance and

Accounting Service, Defense Logistics Agency, Defense Information Services Agency and the Department of Agriculture. Previously, using the traditional method of case processing, each of these reorganizations would have generated the filings of hundreds of representation petitions and literally thousands of unfair labor practice charges due to the major impact of such massive reorganizations. Because of the understandings reached through this alternative process, the only petitions that were filed were those that the parties agreed were necessary, a mere fraction of what normally would have been filed in these situations. Further, there were relatively few unfair labor practice charges filed regarding these reorganizations.

Clearly, the FLRA is prepared to deal with the potential of additional cabinet level and smaller agency reorganizations. Our expertise and leadership in dealing with large scale organizational change will be valuable in assisting the parties in the challenges attendant to major organizational restructuring. The cost of delay in solving the problems associated with such large scale changes will not lead to an effective and efficient government.

New Case Processing Policies

In order to continue to provide better service to our customers, the OGC has recently issued a series of new policies. The first policy, entitled, "Quality of Unfair Labor Practice Investigations," establishes quality standards for the investigation of unfair labor practice charges. The standards are intended to insure that all charges filed with the OGC at any location in the country receive the same high level of quality processing. These are standards we expect our customers to hold us to as we process their cases. This policy includes the introduction of new investigative techniques which will both speed the timeliness of the investigations and provide more cost effective ways of handling the cases with the same level of quality.

The second policy, entitled "Scope of Investigations," also provides guidance in the processing of unfair labor practice charges. The purpose of this policy is to establish guidelines for the extent to which unfair labor practice charges should be investigated. As with the Prosecutorial Discretion policy, this policy seeks to reduce the expenditure of resources of the OGC in investigating cases which should not be investigated. The policy establishes criteria for Regional Directors to determine the type and scope of an investigation based on the totality of the circumstances surrounding the charge and when deemed appropriate, terminate an investigation and solicit withdrawal. This eliminates needless and often expensive investigations of charges which can be determined to be without merit earlier in the investigatory stage of case processing.

Lastly, the "Intervention Policy" sets forth criteria and requirements for using alternative approaches to resolving unfair labor practice charges rather than

traditional investigation methods. These approaches provide the parties with an alternative method of dealing with their disputes without resort to a time consuming, costly investigation that may not address the real issues in dispute that are separating the parties. This policy is an extension of the intervention processes of the OGC that were described above, which have been used to assist high filers of unfair labor practice charges. We will now be making these facilitation, intervention, training, and education programs available to all parties.

STREAMLINING THE FEDERAL APPEALS PROCESS

Efforts at streamlining federal dispute agencies should take into account the specific rights which the dispute agencies are authorized by law to protect. Some of these rights are personal to individual employees. For example, the right to file an appeal to the Merit Systems Protection Board (MSPB) over an adverse action, or the right to file an appeal to the Equal Employment Opportunity Commission (EEOC) over an allegation of discrimination, are individual rights. These individual rights are not within the jurisdiction of the FLRA. Also, the vast majority of third party actions involving poor performers are not within the jurisdiction of the FLRA.

Unlike the EEOC and MSPB, the FLRA addresses the statutory rights given to institutions. For example, the Federal Service Labor-Management Relations Statute confers upon union representatives and management representatives the right to engage in among other things, good faith collective bargaining. Protecting institutional rights is very different than protecting individual rights. Institutions quite frequently are engaged in a course of dealings over a long period of time. To solve the problems of an institution, the federal labor-management program must develop a systemic solution that will survive individual personalities and people.

The OGC has developed an organizational culture unique to prosecutorial / investigatorial agencies charged with the administration of rights based federal laws. We are capable of investigating and prosecuting violations of law with a high degree of proficiency, and at the same time providing services which assist the parties in developing long term solutions to their problems. We are looked to as the trainers of first resort for the parties to learn their responsibilities under the Statute, while at the same time we are enforcing statutory rights and obligations in a manner which allows the parties to resolve the underlying dispute and enhance their long-term relationship. We have developed an approach to fulfilling our prosecutorial responsibilities which is part investigator, part prosecutor, and part trainer, but most of all, a full time problem solver. This unique approach which serves the parties well in the federal sector would not survive in an atmosphere that only fostered an adversarial approach.

Most important, the FLRA represents government's integrated approach to the regulation of a labor-management program involving these institutional rights. The

FLRA, through its three independent components, the OGC, the Authority and the Federal Services Impasses Panel, has developed working arrangements to meet the needs of these institutions. Despite our independent functions, the reality is that all three components can and do work together. While each component cannot interfere in the others' decision-making, the components have developed working arrangements to make certain that the parties using the services of the FLRA are treated appropriately. This coordination helps assure that all possible aspects of a labor dispute are processed as expeditiously as possible. If these functions were separate, it could lead to a loss of this coordination which could interfere with the orderly processing of cases. Any approach to merging the various dispute agencies should take into account the statutory rights of the institutions and individuals they are there to protect, and the value of maintaining a coordinated approach to the regulation of these rights.

CONCLUSION

Mr. Chairman, this concludes my written remarks. Thank you for the opportunity to provide them. I and my colleagues look forward to working with you and the Members of the Committee and I am pleased to answer any questions you may have.

WRITTEN STATEMENT OF BETTY BOLDEN
CHAIR, FEDERAL SERVICE IMPASSES PANEL

Mr. Chairman and Members of the Committee:

Thank you for extending me the opportunity to submit written testimony on behalf of the Federal Service Impasses Panel (the Panel) regarding the important subject of streamlining the process federal employees use to appeal decisions concerning their employment. As noted by Chair Phyllis Segal in her testimony, the Panel resolves impasses between federal agencies and unions representing federal employees arising from negotiations over conditions of employment under the Federal Sector Labor-Management Relations Statute (the Statute) and the Federal Employees Flexible and Compressed Work Schedules Act (the Act). In its statutory role, the Panel is often referred to as the last step in federal sector collective bargaining -- the substitute for the strike and the lockout in the private sector. While recognizing the importance of its statutory role, since its inception in 1970, the Panel has been committed to assisting parties in the voluntary resolution of their bargaining impasses. The current Panel has continued this tradition of voluntarism by emphasizing interest-based bargaining and collaborative approaches to problem solving.

The Panel consists of seven Presidential appointees who serve on a part-time basis, and are supported by a small full-time staff. The Statute requires that Panel Members be appointed "solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations." The fact that my colleagues are eminently qualified to serve in the positions to which they have been appointed is a significant point I will return to later in this statement.

STREAMLINING THE PROCESS

I would like to begin my observations concerning the issue of streamlining by stressing a central fact for the Committee's consideration. The Federal Labor Relations Authority (FLRA) is the only federal agency created by the Civil Service Reform Act of 1978 whose focus is the protection and regulation of the rights of institutions: agencies and the unions representing agency employees. It is within the context of collective bargaining that the rights and obligations of the parties under the Statute are manifested. While the Panel is one of three components within the FLRA, this central fact defines the functioning of all of the components. In contrast, other federal agencies involved in resolving work place disputes focus primarily on the rights of individuals. In considering the ways in which the federal system may be streamlined, therefore, it is crucial not to overlook the distinction between institutional and individual rights which various federal agencies were designed to regulate, for it is woven into the fabric of existing legislation.

Chair Segal has testified that the goal of streamlining the federal employee dispute

resolution process should be to reduce the costs of conflict. I wholeheartedly support this view, and suggest that overlooking the distinction between institutional and individual rights in the process of streamlining could undermine the considerable success the three components of the FLRA have already had in reducing the costs of conflict. In this regard, it is important to note the symbiotic relationship between the Panel and the other two FLRA components. I believe a clear understanding of the nature of this relationship is particularly critical in any discussion of streamlining. Because institutional conflict within the federal sector springs from the same source, the collective bargaining relationship, the three components of the FLRA, though all charged with performing different roles under the Statute, work together in various ways to produce a cost effective system.

Two brief examples should serve to illustrate this point. For years, the components have collaborated in adopting internal mechanisms designed to prevent parties from engaging in forum shopping. These mechanisms have been successful in avoiding the needless expenditure of resources while ensuring that the parties retain their rights to have their issue decided by the most appropriate forum. A second example of component collaboration designed to reduce the cost of conflict is the centralized labor-management cooperation program the FLRA is preparing to launch which will use the knowledge and expertise of all three components to improve federal sector relationships and prevent future conflict.

As the federal sector substitute for the lockout and the right to strike, the Panel has the unique role of ensuring finality in the collective bargaining process. As this Committee considers various streamlining options, it should be clear that as long as collective bargaining in the civil service is deemed to be in the public interest, and federal employees are denied the right to strike, some mechanism for the resolution of bargaining impasses will always be required. An alternative to the Panel that is often mentioned in this context would be to require the parties to go to private arbitrators for the resolution of their impasses. The option appears to be consistent with the current focus on contracting out Government services to the private sector.

It should, however, be understood that the Panel itself on occasion recommends and, if necessary under the particular circumstances of the case, directs the parties to take their impasses to private arbitrators. Moreover, the exclusive emphasis on private arbitration to resolve bargaining in the federal sector does not take into account Congress' intention that those who resolve federal sector impasses be accountable to the governmental process for the decisions they render. The statutory requirement that Panel Members be appointed "solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations," illustrates this concern. The Panel's current composition reflects that the Statute is achieving this important public policy goal.

REDUCING THE COSTS OF CONFLICT AND IMPROVING SERVICE

There was a 27% decrease in the number of requests for the Panel's assistance from FY 1993 to FY 1994. While the number of requests for assistance in FY 1995 decreased only slightly from FY 1994 levels, by about 5 percent, I believe that the trend toward reductions in our caseload is attributable primarily to the development of labor-management partnerships in the federal sector. The development of lasting partnerships, in turn, requires the kind of effective training and intervention programs which are being provided by the FLRA. Although the Panel's traditional role has been to provide finality to the collective bargaining process, it nevertheless has actively promoted the use of alternative modes of dispute resolution, such as interest-based bargaining, in the cases which have come before it.

An outstanding example of the innovative use of such techniques occurred in a recent case involving the American Federation of Government Employees and the Social Security Administration. The dispute involved an issue which was national in scope. The Panel ordered the parties to participate in interest-based training, and to apply the results of their training to the impasse in question. It then collaborated with Authority staff in providing the parties with the training they needed. The joint agency team was able to facilitate a complete settlement of the dispute in a manner that strengthened the parties' relationship, and should result in the prevention of future disputes. The Panel intends to continue to examine its cases for such opportunities.

A key ingredient in assisting parties in the voluntary settlement of their disputes is providing face-to-face assistance. Where face-to-face assistance was not possible, its staff and Members often provided telephone mediation. Our efforts led to tangible results: a 12-percent reduction in the number of cases requiring final Panel action where terms were imposed on the parties.

These accomplishments occurred at the same time as the Panel engaged in efforts to improve the quality of its service. In this regard, Panel Members and staff met directly with customers in Houston, Texas, in May 1995 and Chicago, Illinois, in July 1995, to receive valuable suggestions regarding where improvements could be made. In addition, in September 1995, the Panel sent out customer surveys to all union and management representatives who requested its assistance in FY94

and FY95. The survey is part of its strategy for improving customer service. Finally, in conjunction with the survey, the Panel is undertaking a comprehensive review of its regulations to determine where they need to be streamlined and clarified so that the customer may be better served.

CONCLUSION

I have been the Chair of the Panel since October 1994. During that time I, along with my colleagues, have undertaken various initiatives to improve the quality of service the Panel provides, and to reduce the costs of conflict in the federal sector, all in an effort to provide the American taxpayer an effective and efficient Government. My experience has given me an appreciation of the complexities of federal sector dispute resolution, and of the need for careful and detailed study if streamlining is to produce not only a more cost effective system, but a better system than the one it would replace. Along with FLRA Chair Segal, Member Armendariz, and General Counsel Swerdzewski, I welcome the opportunity to actively participate in that effort.

Mr. MICA. We will turn now to Kathleen Day Koch, who's the Special Counsel of the Office of Special Counsel.

Welcome.

Ms. KOCH. Thank you, Mr. Chairman. I will gladly take advantage of the opportunity to submit my entire written statement for the record.

Mr. MICA. Without objection.

Ms. KOCH. I welcome this opportunity to participate in these hearings, focusing on possible changes in the civil service dispute resolution system.

Mr. Chairman, you may recall that when we met at the start of this Congress, I offered my assistance to you as you assumed the leadership of this committee. I repeat that offer today, and I am willing to respond to any questions you have, as well as the other members of the committee.

Mr. Chairman, members of the committee—subcommittee, I have spent my entire legal career in public service. In fact, I have worked at the Federal Labor Relations Authority as the general counsel, and I was at the Merit Systems Protection Board as a staff attorney. My experience in the Federal Government has provided me with a solid understanding of, as confused as these charts may look, the operation and function of the civil service system. And I am happy to share my thoughts with you today.

Let me begin by discussing my current agency, the Office of Special Counsel. The OSC, as we affectionately refer to it, is an independent agency whose primary mission is to protect Federal employees. It sounds familiar, right? We also protect former employees and applicants for employment from prohibited personnel practices. I think it's important to note, we are not an appeals agency; the others up here are. The OSC has the duty to investigate and, when appropriate, prosecute allegations of prohibited personnel practices. In effect, because we independently evaluate the workplace difficulty that has been brought to us, we actually do function as—somewhat as what Congressman Moran was referring to, a screening mechanism. We resolve quickly those matters that should not go further and bring forward actual violations.

We also operate a whistleblower disclosure unit which allows us to receive from employees whistleblower disclosures that we may then forward to the agency, and that requires a report that we review and submit to Congress and to the President; and we are the agency which has been given the function of enforcing and advising on the Hatch Act.

Mr. Chairman, I would be remiss today if I failed to tell you how proud I am of the accomplishments of the employees of OSC over the past several years and, particularly, the past 2 years. In fact, fiscal years 1994 and 1995 have been record-setting years in terms of the number of favorable actions that we have been able to accomplish with a very small work force.

In fiscal year 1994 we obtained 136 favorable actions, which was a 40 percent increase over the prior year. In the most recent year, fiscal year 1995, we were able to obtain 172 favorable actions, which represents more than 26 percent—a more than 26 percent increase over fiscal 1994. And we were able to achieve these favor-

able actions without protracted and costly litigation in 100 percent of those cases.

It is our experience that when OSC determines that corrective action is warranted in a particular case, the agency almost always, because of an atmosphere and a developed trust of our credibility and fairness, is receptive to an amicable settlement.

During the past 2 years, we conducted a thorough review of our operations with the goal of improving and streamlining many of our procedures. As a result of this review, we began a pilot project in FY–94 under which interdisciplinary teams of investigators and attorneys were established to handle cases from the inception of a full field investigation through to the final disposition of a matter. This is consistent with what one of the members of the first panel discussed in terms of getting actively involved in the dispute as early as possible with the parties, and getting them talking to each other as early as possible to resolve things more quickly.

The object of the pilot project was to ensure meaningful input from both investigators and attorneys in the process of identifying issues and developing strategies. As evidenced by the record number of favorable actions in 1994, the pilot project was very successful, and consequently, we have implemented that project on a permanent basis.

Additionally, I have submitted as part of my written statement a history of the caseload and operations of our agency, as you outlined in your request for me to testify.

Mr. Chairman, it is my understanding that we are here today to explore various ways to make the civil service dispute resolution system more efficient. Certainly, there are many ways that the civil service system could be modified, and I would be happy to discuss with you any specific proposals that you care to raise. Regardless of what revisions are proposed, I would ask you to consider the importance of maintaining the independence of the adjudicatory and prosecutorial functions within the civil service system; maintaining the separation of these functions serves the interests of the government, as well as the individual employees and organizations who pursue their statutory rights through the system. It is my belief that this separation of functions also promotes the credibility, confidence and effectiveness of the entire system.

I welcome today this opportunity to exchange ideas with how we can streamline and improve the civil service system, the due process delivery system, all without harming the rights of those Federal employees that our agencies were created to protect.

Mr. Chairman and members of the subcommittee, as we move forward from this hearing to further discussions, let me assure you, I will be happy to lend my support and ideas as these efforts progress through the Congress.

This concludes my prepared statement, and at this time, I will be happy to answer any questions you may have.

Mr. MICA. Thank you for your testimony.

[The prepared statement of Ms. Koch follows:]

STATEMENT OF THE HONORABLE KATHLEEN DAY KOCH

SPECIAL COUNSEL

U.S. OFFICE OF SPECIAL COUNSEL

BEFORE THE CIVIL SERVICE SUBCOMMITTEE OF THE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE

NOVEMBER 16, 1995

MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE:

I WELCOME THIS OPPORTUNITY TO PARTICIPATE IN THESE HEARINGS FOCUSING ON POSSIBLE CHANGES IN THE CIVIL SERVICE DISPUTE RESOLUTION SYSTEM. MR. CHAIRMAN, YOU MAY RECALL THAT WHEN WE MET AT THE START OF THIS CONGRESS, I OFFERED MY ASSISTANCE AS YOU ASSUMED THE LEADERSHIP OF THIS COMMITTEE. I REPEAT THAT OFFER AND I AM WILLING TO RESPOND TO ANY QUESTIONS THAT YOU MAY HAVE.

MR. CHAIRMAN, I HAVE SPENT MY ENTIRE LEGAL CAREER IN PUBLIC SERVICE. IN FACT, I WORKED AT THE FEDERAL LABOR RELATIONS AUTHORITY (FLRA) AS GENERAL COUNSEL, AND THE MERIT SYSTEMS PROTECTION BOARD (MSPB) AS A STAFF ATTORNEY. MY EXPERIENCE IN THE FEDERAL GOVERNMENT HAS PROVIDED ME WITH A SOLID UNDERSTANDING OF THE OPERATION AND FUNCTION OF THE CIVIL SERVICE SYSTEM, AND I AM HAPPY TO SHARE MY INSIGHTS WITH YOU.

THE FUNCTION OF OSC

MR. CHAIRMAN, LET ME BEGIN BY DISCUSSING MY AGENCY, THE OFFICE OF SPECIAL COUNSEL (OSC). THE OSC IS AN INDEPENDENT AGENCY WHOSE PRIMARY MISSION IS TO PROTECT FEDERAL EMPLOYEES, FORMER EMPLOYEES AND APPLICANTS FOR EMPLOYMENT FROM PROHIBITED PERSONNEL PRACTICES. THE OSC HAS THE DUTY TO INVESTIGATE, AND WHEN APPROPRIATE PROSECUTE ALLEGATIONS OF

PROHIBITED PERSONNEL PRACTICES. WE ALSO OPERATE A WHISTLEBLOWER DISCLOSURE UNIT AND WE ENFORCE THE HATCH ACT.

ON OCTOBER 29, 1994, THE PRESIDENT SIGNED INTO LAW OSC'S REAUTHORIZATION ACT, P.L. 103-424. THE REAUTHORIZATION AMENDED AND EXPANDED FEDERAL EMPLOYEE RIGHTS AND DETAILED CERTAIN PROCEDURAL CHANGES AT OSC. OF PARTICULAR NOTE, THE ACT CREATED TWO NEW PERSONNEL ACTIONS WHICH EXPAND THE TYPES OF CASES THAT OSC CAN INVESTIGATE AND PROSECUTE. ONE SUCH PERSONNEL ACTION IS WRITTEN BROADLY AND ENCOMPASSES ANY SIGNIFICANT CHANGES IN DUTIES, RESPONSIBILITIES, AND WORKING CONDITIONS. THE OTHER PERSONNEL ACTION COVERS "A DECISION TO ORDER PSYCHIATRIC TESTING OR EXAMINATION." IT SHOULD ALSO BE NOTED THAT ALL OF OSC'S PROTECTIONS WERE EXTENDED TO CERTAIN TITLE 38 HEALTH CARE EMPLOYEES OF THE DEPARTMENT OF VETERANS AFFAIRS, AND OSC'S WHISTLEBLOWER PROTECTIONS WERE EXTENDED TO EMPLOYEES OF CERTAIN GOVERNMENT CORPORATIONS.

OSC'S ACCOMPLISHMENTS

MR. CHAIRMAN, I WOULD BE REMISS IF I FAILED TO TELL YOU HOW PROUD I AM OF THE ACCOMPLISHMENTS OF THE EMPLOYEES OF OSC OVER THE PAST TWO YEARS. IN FACT, FISCAL YEARS 1994 AND 1995 HAVE BEEN RECORD SETTING YEARS IN TERMS OF THE NUMBER OF FAVORABLE ACTIONS. IN FY 1994, WE OBTAINED 136 FAVORABLE ACTIONS, WHICH WAS A 40 PERCENT INCREASE OVER THE PRIOR YEAR. IN THE MOST RECENT YEAR, FY 1995, OSC OBTAINED 172 FAVORABLE ACTIONS WHICH REPRESENTS MORE THAN A 26 PERCENT INCREASE OVER FY 1994. OSC WAS ABLE TO ACHIEVE FAVORABLE ACTIONS WITHOUT PROTRACTED AND COSTLY LITIGATION IN 100 PERCENT OF THESE CASES. IT IS OUR EXPERIENCE THAT WHEN OSC DETERMINES THAT CORRECTIVE ACTION IS WARRANTED IN A PARTICULAR CASE, THE AGENCY ALMOST ALWAYS IS RECEPTIVE TO AN AMICABLE SETTLEMENT.

DURING THE PAST TWO YEARS, I CONDUCTED A THOROUGH REVIEW OF OSC'S OPERATIONS, WITH THE GOAL OF IMPROVING AND STREAMLINING MANY OF OUR PROCEDURES. AS A RESULT OF THIS REVIEW, WE BEGAN A PILOT PROJECT IN FY 1994 UNDER WHICH INTERDISCIPLINARY TEAMS OF INVESTIGATORS AND ATTORNEYS WERE ESTABLISHED TO HANDLE CASES FROM THE INCEPTION OF A FULL FIELD INVESTIGATION THROUGH THE FINAL DISPOSITION OF A MATTER. THE OBJECT OF THE PILOT PROJECT WAS TO ENSURE MEANINGFUL INPUT FROM BOTH INVESTIGATORS AND ATTORNEYS IN THE PROCESS OF

IDENTIFYING ISSUES AND DEVELOPING STRATEGY. AS EVIDENCED BY THE RECORD NUMBER OF FAVORABLE ACTIONS IN FY 1994, THE PILOT PROJECT WAS VERY SUCCESSFUL. CONSEQUENTLY, THE PILOT PROJECT HAS BEEN IMPLEMENTED ON A PERMANENT BASIS.

MY REVIEW OF OSC PROCEDURES ALSO LED ME TO THE CONCLUSION THAT TOO MANY CASES REQUIRED THE REVIEW AND APPROVAL OF SENIOR MANAGEMENT. I BELIEVED THAT MANY OF THESE DECISIONS SHOULD BE MADE BY ATTORNEYS AND CASE EXAMINERS AND THEIR LINE SUPERVISORS. THIS ALLOWS FOR MORE EFFICIENT USE OF MANAGEMENT RESOURCES AND, IMPORTANTLY, VESTS MORE OF THE DECISIONAL AUTHORITY WITH THOSE INDIVIDUALS WHO ARE CLOSE TO THE CASES. DECENTRALIZING SOME OF THE DECISION-MAKING LEADS TO AN INCREASED SENSE OF OWNERSHIP OF THE OUTCOME, ENCOURAGING GREATER CREATIVITY IN CASE ANALYSIS.

THE OSC IS ALSO IN THE INITIAL PHASE OF BRINGING THE AGENCY ON-LINE. OUR INTENT IS TO PROVIDE ACCESS VIA THE INTERNET TO FEDERAL EMPLOYEES ACROSS THE COUNTRY AND AROUND THE WORLD. AT PRESENT THE OSC IS ALREADY CONNECTED TO THE INTERNET VIA OPM'S MAINSTREET, AND WE ARE A MEMBER OF THE IGNet WHICH FACILITATES COMMUNICATION AND INFORMATION SHARING WITH THE INSPECTOR GENERAL COMMUNITY. OUR GOAL IN THE NEXT YEAR IS TO BE ABLE TO PROVIDE A FULL INFORMATIONAL PACKAGE ABOUT OSC VIA THE INTERNET AS WELL AS ALLOW FEDERAL EMPLOYEES TO ACCESS PUBLICATIONS, FORMS, AND OTHER IMPORTANT INTERACTIONS ABOUT OSC.

TOWARDS STREAMLINING

MR. CHAIRMAN, IT IS MY UNDERSTANDING THAT WE ARE HERE TODAY TO EXPLORE VARIOUS WAYS TO MAKE THE CIVIL SERVICE DISPUTE RESOLUTION SYSTEM MORE EFFICIENT. CERTAINLY, THERE ARE MANY WAYS THAT THE CIVIL SERVICE SYSTEM COULD BE MODIFIED, AND I WOULD BE HAPPY TO DISCUSS WITH YOU ANY SPECIFIC PROPOSALS THAT YOU CARE TO RAISE. REGARDLESS OF WHAT REVISIONS ARE PROPOSED, I WOULD ASK YOU TO CONSIDER THE IMPORTANCE OF MAINTAINING THE INDEPENDENCE OF THE ADJUDICATORY AND PROSECUTORIAL FUNCTIONS WITHIN THE CIVIL SERVICE SYSTEM. MAINTAINING THE SEPARATION OF THESE FUNCTIONS SERVES THE INTERESTS OF THE GOVERNMENT AS WELL AS THE INDIVIDUAL EMPLOYEES WHO PURSUE THEIR STATUTORY RIGHTS THROUGH THE SYSTEM. IT IS MY BELIEF THAT THIS SEPARATION OF FUNCTIONS ALSO

PROMOTES THE CREDIBILITY, CONFIDENCE AND EFFECTIVENESS OF THE ENTIRE SYSTEM.

IN THIS REGARD, IN SEPTEMBER 1993, THE NPR PUBLISHED HRM08, ENTITLED "IMPROVE PROCESSES AND PROCEDURES ESTABLISHED TO PROVIDE WORKPLACE DUE PROCESS FOR EMPLOYEES." THE REPORT RECOMMENDED THAT THERE BE A WORKING GROUP COMPRISED OF THE MEMBERSHIP OF THIS PANEL TO EXAMINE AND MAKE RECOMMENDATIONS FOR ELIMINATING JURISDICTIONAL OVERLAP IN ADMINISTRATIVE DUE PROCESS CASES. I SUPPORT THIS RECOMMENDATION AND BELIEVE IT WOULD BE AN IMPORTANT FIRST STEP IN REVIEWING THE AGENCIES INVOLVED AND DECIDING HOW TO BEST ELIMINATE OVERLAPS WITHIN THE SYSTEM.

MR. CHAIRMAN, I WELCOME THE OPPORTUNITY TO EXCHANGE IDEAS ON HOW WE CAN STREAMLINE AND IMPROVE THE CIVIL SERVICE DUE PROCESS DELIVERY SYSTEM, WITHOUT HARMING THE RIGHTS OF THOSE FEDERAL EMPLOYEES THAT OUR AGENCIES WERE CREATED TO PROTECT.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, AS WE MOVE FORWARD FROM THIS HEARING TO FURTHER DISCUSSIONS, LET ME ASSURE YOU THAT I WOULD BE HAPPY TO LEND MY SUPPORT AND IDEAS AS THESE EFFORTS PROGRESS THROUGH THE CONGRESS.

THIS CONCLUDES MY PREPARED STATEMENT. AT THIS TIME, I WOULD BE PLEASED TO ANSWER ANY QUESTIONS.

OSC WORKLOAD
FY 1989 - FY 1995

RECEIPTS

FY	MATTERS RECEIVED			ALLEGATIONS IN MATTERS RECEIVED *		
	PPP	HATCH	TOTAL	PPP	HATCH	TOTAL
FY89	1055	102	1157	1785	127	1912
FY90	1361	152	1513	2341	164	2505
FY91	1392	91	1483	2326	108	2434
FY92	1605	137	1742	2816	158	2974
FY93	1914	135	2049	3555	171	3726
FY94	1833	129	1962	3660	140	3800
FY95	1903	88	1991	3481	93	3574
TOTAL	11063	834	11897	19964	961	20925

RESULTS

STAYS			CORRECTIVE OR DISCIPLINARY ACTION COMPLAINTS FILED AT MSPB			OSC NEGOTIATED FAVORABLE ACTIONS		
MSPB	NEGOTIATED	TOTAL	PPP**	HATCH	TOTAL	PPP***	HATCH	TOTAL
1	14	15	6	5	11	15	0	15
9	8	17	11	1	12	44	1	45
3	10	13	2	3	5	72	1	73
1	11	12	0	13	13	108	0	108
6	19	25	1	24	25	100	1	101
7	16	23	15	9	24	137	5	142
3	11	14	4	3	7	171	2	173
30	89	119	39	58	97	647	10	657

* A MATTER MAY CONTAIN MORE THAN ONE ALLEGATION OF WRONGDOING.
**INCLUDES FORMAL CORRECTIVE ACTION COMPLAINTS INITIATED UNDER 1214(B) THAT ARE FILED WITH MSPB.
*** INCLUDES FORMAL CORRECTIVE ACTIONS INITIATED UNDER 1214(b) THAT ARE NOT FILED WITH MSPB.
FISCAL YEARS MARKED IN BLUE (FYS 92-95) DENOTE TERM OF THE CURRENT SPECIAL COUNSEL.

Mr. MICA. I would like to recognize now the chairman of the Equal Employment Opportunity Commission, Mr. Gilbert Casellas.

Mr. Casellas, first of all, I want to tell you that I have never been to Hooter's, but I sure am hearing from a lot of folks who are their clients. I just wanted to let you know that we are hearing a lot from those folks, not that we are going to get into that subject at all.

Mr. MORAN. You just did.

Mr. MICA. I thought you might like to know what Members of Congress are hearing about on another subject.

All kidding aside, we do welcome you and recognize you now for your testimony.

Mr. CASELLAS. Thank you, Mr. Chairman, members of the subcommittee. I would like to request that my full statement be made part of the record.

Mr. MICA. Without objection, so ordered.

Mr. CASELLAS. Let me just say at the outset that all of my training as a lawyer for nearly 20 years, as well as what my counsel tell me now at the EEOC, precludes me by law from either commenting on the existence or nonexistence of any investigations, as tempting as it might be to take a cheap shot against the many cheap shots that I have received. So I will leave it at that, and please don't construe this as a comment one way or the other on the existence or nonexistence of any investigation.

Mr. MICA. Thank you very much. We recognize your good sense of impartiality. Thank you.

Mr. CASELLAS. I certainly believe, as do the—and agree with the members of this panel that, consistent with the goals of the National Performance Review, it's fully appropriate to review Federal Government civil service and employee complaint processes to determine where streamlining and improvement can be accomplished.

However, insofar as this review addresses the EEOC's role in the Federal appeals processes, it is also my view that it must also be guided by the principle that safeguarding civil rights of Federal employees is of paramount value. Unlike anyone else who is testifying here today, we are the only civil rights agency testifying today, and what we do is fundamentally different. There is an intersection between civil rights and personnel law, but it is a limited and a very controlled intersection. Our jurisdiction is based on laws, civil rights laws, that apply both to the private sector and to the Federal sector.

The unfortunate reality is that discrimination and the problems of unequal opportunity persist in the Federal Government and the current work force statistics on this are instructive. They reveal that minorities and women continue to be concentrated at the lower grade levels of Federal employment and that their representation falls as grade level rises. In Federal white collar employment generally, whites continue to hold jobs that average one and two grades higher than those held by minorities. This is instructive because unlike the private sector where most of the complaints relate to discharge, in the Federal sector most of them relate to promotions and to terms and conditions.

While I don't suggest that every one of the cases filed or every one of the statistical disparities connotes illegal discrimination, I

can state that discrimination remains a problem in the Federal sector. The complaint processing system currently governing Federal sector EEO complaints is guided by EEOC procedural regulations that were developed in 1991 after extensive consultation with Federal employee management and labor groups.

A Federal employee alleging discrimination must first seek counseling and file a complaint with his or her Federal employer. The Federal agency then conducts an investigation of the complaint and an EEOC administrative judge presides over an administrative hearing prior to the issuance by the agency of its final decision. And after the agency renders its final decision, the EEOC adjudicates appeals of final agency decisions.

Now, there's discussion concerning the difficulty of removing poor performers based on Federal managers' fear of false discrimination claims. There's also a perception that Federal employees file frivolous discrimination claims to avoid or to frustrate performance-based actions being taken against them. In addition, it's been argued that the appeals processes available to Federal employees are too many and too complicated.

In my view, a relationship has not been shown to exist, nor does it exist, between the civil rights protections currently extended to Federal employees and the problem of poor performance—poor performers. The current system works effectively to eliminate duplication of effort and unnecessary burdens in connection with the processing of civil rights complaints, so there is not the necessary empirical predicate to support major changes to the current system. And I would like to discuss just five points very briefly, and I have attached to my written testimony a 10-year statistical summary of the EEOC's Federal complaints processing activities.

First, any effort to limit the right of Federal employees to file civil rights complaints would raise serious concerns. Like the private sector counterpart, the system that protects Federal workers from employment discrimination is a complaint-driven system. Any abridgement of Federal employees' rights to file individual discrimination complaints would afford them fewer civil rights protections than are afforded workers in the private sector, the same statute.

Second, some suggest that the rights of Federal employees to raise discrimination allegations should be eliminated when agencies take performance-based actions against them. That approach would permit an unjustly arbitrary application of performance standards in Federal employment.

For example, a manager could fire all African Americans for poor performance, but retain whites who similarly perform poorly; and the fired employees would have no recourse to address the obvious and unlawful discrimination. So seen in that light, any such proposal is obviously unacceptable.

Moreover, the empirical evidence shows that these cases do not present a practical problem. While this mixed case process has been criticized as burdensome and leading to duplication of efforts, the facts do not support these claims. Indeed, there were only 173 requests for reviews of MSPB decisions filed with the EEOC in fiscal year 1994; that's 2.4 percent. EEOC and MSPB have not disagreed over the final resolution of a case since 1987.

The EEOC also has dual responsibility with the Federal Labor Relations Authority for certain grievances which raise discrimination issues under a negotiated grievance procedure. Again, there are very few cases which fall within these procedures. In 1994, for example, EEOC received and reviewed one appeal of a grievance on the merits of an FLRA decision.

Third, the concerns that Federal employees routinely file discrimination complaints are not borne out by EEOC data. We can't determine anyone's subjective motive in filing a charge or failing to take a personnel action, but the limited information we have doesn't support that concern. In fact, we receive fewer than 6 percent of all of the appeals containing allegations relating to—fewer than 6 percent of all of the appeals had allegations relating to an evaluation or appraisal issue, and we don't see any difference in the resolution of those. You would expect that there would be a higher resolution of findings of frivolous complaints if they were indeed frivolous, and we don't see that.

No. 4, our data doesn't support the concerns that people believe that employees are flooding the agencies with multiple appeals; employees are required by law to elect one forum when more than one forum is available. And finally on this question of frequent filers, we address that through consolidation and dismissal mechanisms that are already a part of the complaints processing system.

I do believe it's essential for us to address how we are handling Federal sector responsibilities with an eye toward making those processes as efficient and effective as possible. We have done that in our own private sector review. I arrived there 13 months ago, and we have undertaken some major review of our private sector operations and are now beginning a review of our Federal EEO—Federal sector operations. So any changes in the complaints processing system, I think, must preserve and not limit Federal employees' rights to file employment discrimination complaints when they believe that their employers have discriminated against them. I fully support the efforts of this committee and look forward to answering your questions.

Mr. MICA. We thank you for your testimony.

[The prepared statement of Mr. Casellas follows:]

STATEMENT OF
GILBERT F. CASELLAS, CHAIRMAN
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
U.S. HOUSE OF REPRESENTATIVES
NOVEMBER 29, 1995

Good morning Chairman Mica and members of the Subcommittee. Thank you for inviting me here today to discuss streamlining the various appeals processes available to federal employees.

I certainly believe that, consistent with the goals of the National Performance Review, it is fully appropriate to review federal government civil service and employee complaint processes to determine where streamlining and improvement can be accomplished. However, insofar as this review addresses the Equal Employment Opportunity Commission's (EEOC) role in the federal appeals processes, it is also my view that it must be guided by the principle that safeguarding the civil rights of federal employees is a paramount value.

The unfortunate reality is that discrimination and the problems of unequal opportunity persist in the federal government. As much as we would all like to believe that these problems have been largely resolved, both the quantity and the nature of the complaints filed provide potent evidence to the contrary. It is useful to review some of the key indicia of the problem. During fiscal year (FY) 1994, there were 68,084 counselling contacts (the first step in the federal sector equal employment opportunity (EEO) process) initiated by federal employees government-wide and 24,592 formal EEO complaints were filed. More than half of the more than 21,000 cases closed by agencies that year resulted in a corrective action by the agency, through settlement or otherwise. The EEOC received 7,141 appeals of agency decisions. Administrative backpay awards totaled more than $17 million government-wide.

In addition, current workforce statistics are instructive. They reveal that minorities and women continue to be concentrated at the lower grade levels of federal employment and that their representation falls as grade level rises. Looking again to FY 1994, women were 72.61 percent of government employees in grades 1 through 8 and minorities held 38.87 percent of these lower graded positions. However, at the grade 15 level, women dropped to 17.44 percent of the total and minorities, to 12.65 percent. In the Senior Executive Service, the highest ranks of civil service employment, women were only 16.35 percent of the total while minorities were only 9.8 percent. In federal white collar employment generally, whites continued to hold jobs that averaged between one and two grades higher than those held by minorities.

While I do not suggest that every one of the cases filed, or every one of these statistical disparities, connotes illegal discrimination, I can state that discrimination remains as a serious problem in the federal sector. Moreover, while I will not recite a list of cases which have been decided against the government, suffice it to say there are too many cases of blatant and egregious discrimination still going on today. These are problems which must be addressed and not swept under the rug, either through a diminution of substantive or procedural rights.

STREAMLINING

The Equal Employment Opportunity Commission was created with the enactment of Title VII of the historic Civil Rights Act of 1964 to enforce the federal right to equal employment opportunity in the private sector. The EEOC assumed authority and responsibility over allegations of discrimination filed by federal employees in 1979 as part of President Carter's Reorganization Plan No. 1. The transfer of authority over the federal EEO process occurred in concert with the passage of the Civil Service Reform Act of 1978 (CSRA).

The complaint processing system currently governing federal sector EEO complaints is guided by EEOC procedural regulations that were developed in 1991 after extensive consultation with federal employee, management and labor groups. A federal employee alleging discrimination based upon race, color, religion, sex, national origin, age, and disability must first seek counseling and file a complaint with his or her federal employer. The federal agency then conducts an investigation of the complaint and an EEOC administrative judge presides over an administrative hearing prior to the issuance by the agency of its final decision. After the agency renders its final decision, EEOC adjudicates appeals of final agency decisions on complaints of discrimination filed by federal employees and applicants.

Inherent problems in the civil service system, including problems with the employment discrimination complaints process, motivated the changes that took place in 1979. Many of the same concerns about the civil service system are again being voiced, particularly concerns about the difficulty of removing poor performers in federal employment. There is discussion concerning the difficulty of removing poor performers based on federal managers' fear of false discrimination claims. There is a perception that federal employees file frivolous discrimination claims to avoid or to frustrate performance-based actions being taken against them. In addition, it has been argued that the appeals processes available to federal employees are too many and too complicated.

In my view, a relationship has not been shown to exist -- and does not exist -- between the civil rights protections currently extended to federal employees and the problem of poor performers. Moreover, in my judgment, the current system works effectively to eliminate duplication of effort and unnecessary burdens in connection with the processing of civil rights complaints. In short, there is not the necessary predicate to support major

changes to the current system. Let me discuss the principal issues in turn. I have included, as an attachment to my testimony, a ten-year statistical summary of EEOC's federal complaints processing activities.

First, any effort to limit the right of federal employees to file civil rights complaints would raise serious concerns. Like its private sector counterpart, the system that protects federal workers from employment discrimination is a complaint-driven system. Employees have the right to file administrative complaints when they believe their federal employer has unlawfully discriminated against them. In addition, all employees have the right to pursue their discrimination claims in federal district court if they are unsatisfied with the administrative decision. Any abridgement of federal employees' rights to file individual discrimination complaints would dramatically alter the fundamental civil rights protections afforded federal employees provided by the 1972 amendments to the Civil Rights Act of 1964, and such an abridgement would afford federal employees fewer civil rights protections than are afforded workers in the private sector.

Second, some suggest that the rights of federal employees to raise discrimination allegations should be eliminated when agencies take performance-based actions against them. To begin with, the suggestion to prohibit the raising of an affirmative defense of unlawful discrimination in matters dealing with performance-based actions would permit an unjustly arbitrary application of performance standards in federal employment. For example, a manager could fire all African-Americans for poor performance but retain Whites who similarly perform poorly; the fired employees would have no recourse to address the obvious and unlawful discrimination. Seen in that light, any such proposal is obviously unacceptable. Eliminating civil rights for federal employees in any respect would set a dangerous precedent and would significantly interfere with Congress' mandate that the federal government be a model employer.

Moreover, the evidence shows that these cases do not present a practical problem. Under the 1979 reforms, the EEOC shares limited appellate responsibilities with other federal agencies. Under the CSRA, EEOC shares jurisdiction with the Merit Systems Protection Board (MSPB) for those employment complaints which raise allegations of discrimination as a defense for an adverse personnel action appealable to the MSPB -- referred to as "mixed" cases. While this mixed case process has been criticized by some as burdensome and leading to duplication of effort, the facts do not support these claims. Indeed, there were only 173 requests for reviews of MSPB decisions filed with EEOC in FY 1994 (See Table). EEOC and MSPB have not disagreed over the final resolution of a case since 1987. EEOC also has dual responsibility with the Federal Labor Relations Authority (FLRA) for certain grievances which raise discrimination issues under a negotiated grievance procedure. Again, there are very few cases which fall within these procedures. For example, in 1994, EEOC reviewed one appeal of a grievance on the merits of an FLRA decision.

This experience shows that the system works as Congress intended. These shared appellate responsibilities have not multiplied the forums available to federal employees, but have created complimentary processes that the agencies have handled well. Importantly, EEOC closed 17,185 appeals during the period 1993-1995; however, only four cases were on appeal from FLRA decisions[1] and 521 were on appeal from MSPB decisions. EEOC's regulations for processing these federal complaints of discrimination are set forth in Title 29 C.F.R. Part 1614. I have included, as an attachment to my statement for the record, a summary of the current federal EEO complaint process, including the procedures for mixed case complaints and grievances.

Third, the concerns that federal employees routinely file discrimination complaints to frustrate or avoid performance-based actions against them are not borne out by EEOC or MSPB data. While the agencies and EEOC cannot determine anyone's subjective motive in filing a charge or failing to take a personnel action, the limited information we have available does not support the concern.

In particular, it is useful to examine the resolution of performance-related complaints that raise discrimination in evaluations and appraisals. In fiscal year 1995, EEOC received 8,152 appeals of agency decisions on discrimination complaints. Less than six percent of those appeals contained allegations related to an evaluation or appraisal. If employees were routinely filing frivolous complaints to thwart performance-based actions, we would expect that the percentage of the appeals found to have merit in performance-related cases would be less than the percentage of all complaints found to have merit. We found, however, that the percent of appeals involving appraisals or evaluations resulting in discrimination findings is nearly identical to the percentage of all appeals to have merit.

Fourth, EEOC's data do not support the concerns of those who believe that employees are flooding agencies with multiple appeals. Congress enacted the CSRA in part to address problems of multiple and duplicative avenues of relief that existed prior to 1979. The procedures established by the CSRA require employees to elect one forum when more than one forum is available. The Act ensures that agencies with dual responsibility for adjudicating federal employee personnel complaints have non-duplicative, but interrelated responsibilities and authority.

Finally, there is no data to support the argument that there is a significant problem caused by employees who flood the system with multiple discrimination complaints. The EEOC addresses such "frequent filers" through consolidation and dismissal mechanisms that are already part of the complaints processing procedures.

While I believe that many of the concerns that have been articulated are based more on "conventional wisdom" than a careful analysis of the problem, I do believe that it is

[1] EEOC dismissed one appeal because it lacked jurisdiction and another appeal due to timeliness issues.

essential for EEOC to address how it is handling its federal sector responsibilities with an eye to make those processes as efficient and effective as possible.

Like the EEOC private sector review that I initiated in November 1994, we have recently undertaken a major review of our federal equal employment opportunity operations. As with the private sector review that led to comprehensive internal operating changes, we can and will address many of these problems and we look forward to working together with this Committee in achieving that end. However, we cannot support eliminating or restricting civil rights in federal employment. Any changes in the complaints processing system must preserve and not limit federal employees' rights to file employment discrimination complaints when they believe their employers have discriminated against them.

The EEOC has been charged with a noble mission -- to eradicate unlawful discrimination in the workplace. Despite severely limited resources, the Commission has made great strides toward accomplishing its goal. Contrary to this nation's best hopes, however, unlawful discrimination is still a very real and widespread problem in both the private and federal sectors.

Therefore, although I fully support the efforts of this Committee to improve the efficiency and effectiveness of federal employee personnel systems, and to address adverse public perceptions about federal employees, I believe it is critical that we continue to protect the rights of federal employees to be free from unlawful discrimination in their federal employment.

Thank you for the opportunity to comment. I will be happy to answer any questions you may have.

MIXED CASE - RECEIPTS AND CLOSURES			
FY	**Total Receipts / Closures**	**Mixed Case Receipts**	**Mixed Case Closures**
93	6361 / 5490	178 (2.8%)	161 (2.9%)
94	7141 / 5678	173 (2.4%)	207 (3.6%)
95	8152 / 6017	158 (1.9%)	153 (2.5%)

OFFICE OF FEDERAL OPERATIONS

FEDERAL COMPLAINT STATISTICS
FY 1984 - FY 1994*

	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988	FY 1989	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994
COUNSELING CONTACTS	84,561	86,956	86,906	83,416	79,903	75,868	79,743	83,604	81,530	67,654	68,084
FORMAL COMPLAINTS											
RECEIPTS	17,916	19,386	18,167	15,931	15,972	16,174	17,107	17,696	19,106	22,327	24,592
RESOLUTIONS	17,045	18,337	17,962	17,014	17,844	16,091	15,880	16,813	17,389	19,500	21,565
HEARINGS											
RECEIPTS	4,991	5,123	5,258	5,045	5,278	5,183	5,417	5,773	6,907	8,882	10,712
RESOLUTIONS	4,930	5,137	5,191	5,047	6,227	5,619	5,186	5,051	6,100	8,906	9,507

**Information for FY 1995 is not available at this time.*

FEDERAL APPEALS STATISTICS
FY 1984 - 1995

	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988	FY 1989	FY 1990	FY 1991	FY 1992	FY 1993	FY 1994	FY 1995
RECEIPTS	3,336	3,836	4,157	4,546	5,152	5,540	5,722	5,305	5,997	6,361	7,141	8,152
RESOLUTIONS	2,105[1]	3,626	3,900	5,659	6,380	5,800[2]	5,858	5,303	5,434	5,490	5,678	6,017

[1] Format changed from "short form" to detailed, self-contained decisions.

[2] Resolution total reflects a reduction of 21 positions from the previous fiscal

FEDERAL SECTOR
EQUAL EMPLOYMENT OPPORTUNITY

29 CFR PART 1614

SUMMARY

ORGANIZATION

Part 1614 is structured into six subparts:

Subpart A: Agency programs promoting equal employment opportunity, and procedures for processing individual and class complaints of discrimination and retaliation

Subpart B: Additional provisions on processing certain types of complaints (Age, Equal Pay, Rehabilitation Act, and class)

Subpart C: Explains relationship among EEO process, negotiated grievance procedure and Merit Systems Protection Board appeals

Subpart D: EEOC appeals and the right to file civil actions under each EEOC administered statute

Subpart E: EEOC's policy on remedies and relief for discrimination

Subpart F: Miscellaneous provisions applying to EEO programs

COVERAGE

Applies to all complaints of discrimination including those under the Equal Pay Act.

AFFIRMATIVE PROGRAMS

Each agency shall maintain a continuing affirmative program to promote equal employment opportunity and to identify and eliminate discriminatory practices and policies. Part 1614 outlines specific objectives and tasks that agencies must achieve -- from appraisal and communication to reasonable accommodation and reassignment.

PRE-COMPLAINT PROCESSING

As with part 1613, a person believing they have been retaliated or discriminated against on the basis of race, color, religion, sex, national origin, age, or disability must, under part 1614, (1) seek counseling from the alleged discriminating agency prior to filing a complaint, and, (2) file a written complaint with that agency if an informal resolution was not reached. Part 1614 extends from 30 to 45 days the time limit during which an employee or applicant must generally contact a counselor after the discriminatory event or personnel action occurs. An agency may permit counseling up to 180 days after the discriminatory event based on several factors, e.g., (1) the individual was not notified of the time limits or otherwise aware of them, or (2) he or she did not know and reasonably should not have known that the matter or personnel action that occurred was discriminatory. Counseling beyond 180 days shall only be permitted in situations where the late filing of a private sector charge would be justified by facts indicating the appropriateness of waiver,
estoppel or equitable tolling.

Ordinarily, counseling must be completed within 30 days unless both parties agree to a maximum extension of an additional 60 days. In cases where an employee or applicant elects to use alternative dispute resolution procedures available as part of the agency's counseling function, counseling must be completed within 90 days. If the matter has not been informally resolved, the individual shall be informed in writing at the conclusion of the counseling period of the right to file a discrimination complaint.

AGENCY PROCESSING OF INDIVIDUAL COMPLAINTS

An agency must acknowledge receipt of a properly filed complaint in writing and conduct a complete and fair investigation within 180 days from the filing date of the complaint. With the complainant's consent, agencies may extend processing for up to an additional 90 days. In developing a complete and impartial factual record, agencies may use any fact-finding methods that efficiently and thoroughly address the matters at issue. During the 180-day period, agencies' responsibilities are limited to investigation, settlement attempts and issuance of a notice of final action. Part 1614 eliminates the informal adjustment and proposed disposition stages of part 1613.

After the agency completes its investigation within 180 days from the filing of the complaint or within any allowable period of extension, the agency shall notify the complainant that he or she can request a hearing by an EEOC administrative judge within 30 days or, alternatively, an immediate final decision by the employing agency. If the complainant requests a final decision or the 30-day period lapses without the individual requesting a hearing, the agency will have 60 days to issue the decision.

If the complainant requests a hearing, an administrative judge shall oversee discovery, conduct a hearing, issue findings of facts and conclusions of law, and, where a finding of discrimination

is made, order an appropriate remedy. To insure complete, fair investigations being conducted by agencies within the 180-day limit, the regulation prescribes the use of adverse inferences and permits both parties to obtain findings of fact and conclusions of law without a hearing, a type of summary disposition, for some or all issues in a complaint. The use of adverse inferences and summary dispositions will provide incentives for agencies to conduct complete, fair investigations within the 180-day period. The administrative judge must decide the case within 180 days unless he or she makes a written determination that good cause exists for enlarging the normal 180-day period.

By keeping the hearing stage at the agency level as part of the investigatory process, the agency retains the same opportunity that it now has under part 1613 to issue a final decision provided it does so within 60 days of receipt of the administrative judge's findings and conclusions. The final decision shall consist of findings by the agency on the merits of each issue in the complaint, appropriate relief if discrimination is found, and contain notice of the complainant's appellate rights and time limits. The administrative judge's findings, conclusions, and relief ordered shall become the agency's final decision if the agency does not issue its own decision within 60 days. After the final decision of the agency is issued, or the findings and conclusions become final, the complainant may appeal to the Commission by filing an appeal with the EEOC within 30 days.

APPELLATE PROCESSING BY EEOC

Where an agency dismisses all or part of a complaint, a dissatisfied complainant may file an expedited appeal with the EEOC to guard against undue delays in complaint processing because of an improper dismissal. The EEOC may determine that a dismissal was improper, reverse the dismissal, and remand the matter back to the agency for completion of the investigation.

A complainant, member or agent of a class, or a dissatisfied grievant may appeal to the EEOC from a final decision or from a decision of an agency to dismiss an allegation in a complaint. Except for mixed case complaints, any dismissal of a complaint or portion of a complaint or any final decision may be appealed to the Commission within 30 days from a complainant's receipt of a dismissal or final decision. Any grievance decision may also be appealed within 30 days of a receipt of a decision. The Commission will examine the record, may supplement it, draw adverse inferences when appropriate, and issue decisions. Either party may request reconsideration by the Commission of an Office of Federal Operations decision, or the appellant can file a civil action in federal court.

THE REHABILITATION ACT

Based on the plain language of section 501 of the Rehabilitation Act, part 1614 specifies that the legislative and judicial branches are not covered under that Act. Current users of illegal drugs, with some exceptions, are now excluded from the definition of an individual with a disability under section 512 of the Americans with Disabilities Act.

Part 1614 prescribes reassignment as a special affirmative requirement under section 501. The reassignment obligation would not be a component of the statute's reasonable accommodation requirement under section 504. The agency should consider reassignment whenever an employee with a disability can no longer perform his or her job and must reassign such an employee whenever the circumstances described in the regulation are met.

OPTING OUT OF CLASS COMPLAINTS

Part 1614 eliminates the opting out provisions contained in part 1613 that preserved the individuals right to file his or her own complaint or lawsuit. All class members will receive notice that the class complaint has been filed and notice of any settlement or decision on the class complaint. If they do not wish to participate in the class or to file a claim for individual relief, they do not have to do so. Those wishing to participate will have the opportunity to object to any proposed settlement and to file claims for individual relief if discrimination is found.

ELECTION OF REMEDIES

Employees of agencies subject to 5 U.S.C. § 7121(d) and covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure must elect initially to pursue a matter that is both grievable and allegedly discriminatory either through the negotiated grievance procedure or under part 1614, but not both. An aggrieved employee who files a complaint under part 1614 may not thereafter file a grievance on the same matter. Likewise, an aggrieved employee who files a grievance alleging discrimination may not thereafter file a complaint on the same matter under part 1614. A grievant maintains the right to appeal to EEOC from a final grievance decision.

Agencies not subject to section 7121(d) may, but need not, hold a complaint in abeyance during the processing of a grievance on the same matter provided they notify the complainant. This provision was added in consultation with the U.S. Postal Service which estimates it may reduce the number of charges that will require processing by 2,000 or more a year. If agencies elect not to hold the complaint in abeyance, the normal time limits apply and the agency must issue a notice of final action on the complaint within 180 days.

A "mixed" case involves a personnel action appealable to the Merit Systems Protection Board (MSPB) where the employee has raised an allegation of discrimination. An aggrieved person may initially file a mixed case complaint with an agency under part 1614 or an appeal on the same matter with the MSPB pursuant to 5 C.F.R. 1201.151, but not both. Individuals with mixed case complaints receive hearings on those complaints before MSPB and not EEOC.

The regulations also address those situations where MSPB determines that a case is not within its jurisdiction, in effect "unmixing" the complaint. When a mixed case appeal is dismissed by the MSPB for jurisdictional reasons, an individual is allowed to file an EEO complaint provided the individual obtains counseling within 45 days from the notice of MSPB's dismissal. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and it is dismissed by MSPB for jurisdictional reasons, the agency shall give the individual the right to elect between a hearing by an administrative judge or an immediate final decision by the agency.

Individuals who have received a final decision from MSPB on a mixed case appeal or on the appeal of a final decision on a mixed case complaint may petition EEOC to consider that decision. If EEOC disagrees with MSPB, then the decision is sent back to MSPB to reconsider its decision in light of EEOC's decision. If MSPB disagrees with EEOC's decision then the case is referred to a "Special Panel" established under the Civil Service Reform Act.

AGE DISCRIMINATION IN EMPLOYMENT ACT

When an individual has not filed a notice of intent to sue but has pursued a complaint through the administrative process, the courts have split on the issue of the correct statute of limitations applicable to ADEA lawsuits by federal employees. EEOC believes that the limitations period applicable to civil actions under Title VII should be borrowed for federal sector ADEA lawsuits. That period is now 90 days as a result of the Civil Rights Act of 1991. Besides applying to Title VII, it also applied the 90-day period to suits brought under sections 501 and 505(a) of the Rehabilitation Act, and ADEA suits brought by private sector and state and local government employees who have filed a charge with the Commission under ADEA.

Those persons who elect to use the notice provision as the prerequisite to suit in U.S. district court must give EEOC not less than 30 days' notice in writing of their intent to file such an action. Such notice must be filed within 180 days of the occurrence of the alleged unlawful practice.

Part 1614 provides that a complainant exhausts administrative remedies under the ADEA either (1) 180 days after filing a complaint if the agency has not issued a decision and an appeal has not been taken, (2) after a final decision by the agency, (3) 180 days after filing an appeal with the EEOC, if EEOC has not issued a decision, or (4) after EEOC issues a decision on appeal.

REMEDIES

Part 1614 leaves unchanged part 1613's standard that full relief should be provided to an individual when discrimination is found unless the record contains clear and convincing evidence that the individual would also have not been selected even in the absence of Discrimination. It is important to distinguish this regulation from the Supreme Court's decision in Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989) which held that an employer can avoid liability, and hence any relief, in a mixed motive case upon showing by a preponderance of the evidence that the same determination would have been made even absent discrimination.

Part 1614 provides that interest on back pay may be awarded to federal applicants or employees who prevail in discrimination claims, and that while attorney's fees awards provisions shall apply to allegations of discrimination or retaliation prohibited by Title VII and the Rehabilitation Act, they do not apply under ADEA. The Civil Rights Act of 1991 amends section 717 of Title VII to provide for the payment of interest on back pay; this waiver of sovereign immunity authorizes EEOC to award interest in Title VII and Rehabilitation Act cases.

Mr. MICA. I will start off with a few questions for the chairman of the MSPB, Mr. Erdreich.

The charts that you attached to your testimony show that between 1993 and 1994 initial appeals rose by 1,837 and Board initial decisions increased by 2,334 between 1994 and 1995. Could you tell me what these increases are attributed to?

Mr. ERDREICH. Mr. Chairman, I—of course, we are the recipients, we are like a court. Folks bring complaints to us as they deem they have complaints.

I can say that in the last 2 years, the largest category of increase has been RIF cases, which, I guess, is not surprising as, of course, the downsizing of government is generating a number of folks who are moving out of jobs and complaining about the processes.

Mr. MICA. What percent would the RIF cases be?

Mr. ERDREICH. The increase, as I recall—I can get that to you, Mr. Chairman—was something like a 15 or 20 percent increase in RIF cases alone; and that's off the top of my head. Let me give that to you later.

Mr. MICA. We would appreciate that.

[The information referred to follows:]

The number of RIF appeals has increased dramatically since 1993 when I became Chairman.

Year	RIF Appeals	Percent of Total Appeals	Increase over prior year
FY 1995	2,303	24%	252%
FY 1994	654	9%	93%
FY 1993	339	5%	

Mr. ERDREICH. I can also tell you that in the last 2 years, in one category alone, postal cases, we had approaching, again off the top of my head, about 2,000 cases alone that related to the effort of the post office to reorganize, and cases filed with us and actions we took that generated about 2,000 cases, a little bit better than that. I will get those to you after the hearing, Mr. Chairman.

[The information referred to follows:]

POSTAL SERVICE REORGANIZATION CASES
DECIDED BY MSPB IN FY 1993-1995

	FY 1993	FY 1994	FY 1995	TOTAL
Regional\Field Offices:				
Initial Appeals	172	228	2,551	**2,951**
Addendum Cases:				
Attorney Fee Requests			131	131
Petitions for Enforcement	Not	Not	110	110
Board Remands	Tracked	Tracked	5	5
Total Addendum			246	**246**
Total Regional\Field Offices	172	228	2,797	**3,197**
Board Headquarters:				
Petitions for Review	3	166	550	**719**
Reopenings	0	23	1	24
Compliance Referrals	0	0	1	1
Requests to Stay Board Order	0	28	0	28
Total Board	3	217	552	**772**

The Postal Service began to implement its reorganization in the Fall of 1992, and the Board began to receive appeals soon thereafter. Decisions in FY 1993 and FY 1994 and virtually all decisions in FY 1995 are in cases resulting from the original reorganization. Following the compliance RIF implemented by the Postal Service in the Summer of 1995, MSPB began receiving "second wave" appeals challenging actions taken in the compliance RIF. These cases continue to be processed in the regional and field offices and will undoubtedly result in additional petitions for review by the Board. Decisions in these cases will be reflected in our statistics for FY 1996.

Addendum cases related to the Postal Service reorganization were not tracked separately from other addendum cases until FY 1995. We know, however, that we did not begin to receive these addendum cases until FY 1994 and that virtually none were decided in that fiscal year.

Compliance referrals are cases referred to the Board for enforcement after an administrative judge, ruling on a petition for enforcement, has determined that the agency has not complied with the Board's order. Although only one such case was decided in FY 1995, approximately 50 have been decided in the first two months of FY 1996. In these decisions, the Board ruled that the Postal Service's compliance RIF constituted compliance with the Board's earlier orders reversing RIF actions.

Mr. MICA. So based on your experience with RIFs and reorganizations, you would anticipate a continuing pattern of increases?

Mr. ERDREICH. I would, Mr. Chairman. What's going on with the changes in agencies will certainly generate many additional cases to us and should be in these categories.

A second category, related to the fact that employees are moving out of their jobs, is retirement cases. As you know, we review cases from OPM on retirement determinations. It would follow then that with more folks leaving employment, some will have concerns about that determination and come to us on retirement cases. That is the second category of increase.

I would be glad, after the hearing, to send you the details of the specific numbers and where they are generated from.

Mr. MICA. I think we would appreciate that data.

[The information referred to follows:]

In FY 1994, retirement appeals were 26% of the Board's total workload (1,975 of 7,530 cases), up from 17% in FY 1993 (1,192 of 6,861 cases). In FY 1995, retirement appeals were 15% of the total workload (1,546 of 9,594 cases).

Mr. MICA. In the area of mixed cases, do you believe that the Federal Government can provide employees with a fair hearing while using fewer resources than we do currently?

Mr. ERDREICH. Well, as you know, our job is to be the neutral arbiter of these cases that come to us. I have no doubt that we at each agency can look for ways to streamline and improve the way in which we go about our business of resolving disputes; and I would say that, yes, certainly we could do with fewer resources, all of us can, but I would raise, as an opening, Mr. Chairman, what I touched upon and what others on this panel have mentioned, that this panel and Congress look toward alternative dispute resolution modes that the private sector is now utilizing in a variety of very creative ways and should be also utilized inside our public sector to try to resolve these disputes before they come to us.

We are, again, like a court. We receive whatever complaints are going to be generated and come to us. But we, I believe, as a government, can be most efficient and a better utilizer of resources if we can develop better modes of dispute resolution where they start—in the workplace; resolve the disputes there. Hopefully, they never come to us.

I realize we will get a fair number of disputes but that would be, I believe, the best use of resources to begin at the beginning in the workplace where the disputes arise.

Mr. MICA. Well, both the figures that MSPB has provided and GAO has shown us that EEOC affirms more decisions involving discrimination at a very high rate. By my calculation, based on your figures, the EEOC has affirmed or dismissed 97 percent of the MSPB's decisions since 1987. Why can't we simply eliminate the current mixed case procedure and trust the Board to handle these discrimination cases?

Mr. ERDREICH. Oh, I mean, Congress could do whatever it wishes to do, Mr. Chairman. But I wouldn't want to comment on that policy judgment. That's a policy decision Congress could make.

We certainly are able to resolve disputes that come to us. As you heard from the chairman of the EEOC, there's a strong policy reason why the EEOC was created by this Congress—not this sitting

Congress, but a prior Congress—to handle those disputes, but it's a policy judgment Congress could make.

Mr. MICA. Well, with that question, I will turn to Mr. Casellas. You had also expressed some concern about Federal employees possibly not having the same rights as citizens in the private sector.

In the EEOC/MSPB mixed cases arena, what's your feeling here? Why can't we eliminate the mixed case procedure and still adequately protect employees against discrimination?

Mr. CASELLAS. Well, again, as Chairman Erdreich just mentioned, the question is who does it and who is better able to do it. We were created not to adjudicate but to enforce the civil rights laws; and there is that intersection between personnel issues and civil rights issues. And with regard to the personnel issues, qua personnel issues, we are certainly no experts or no more expert than MSPB is with regard to those issues. Our expertise lies in the civil rights arena.

But the question is whether it is as big a problem. I think what I pointed out was that there are so few of these cases that we are—we are trying to fix a system with regard to one aspect of it that I am not sure is really empirically such a big problem. Because, you know, we start off with 65,000 complaints, at least contacts, at Federal agencies and that's reduced by two-thirds to some 20,000 actual complaints, and then that's reduced further and further.

So when we get to the end of this process where we have mixed cases, it is really, as I said, 2 percent of the cases that we handle.

Mr. MICA. You also seem to indicate that you didn't think frequent filers was a problem, and you described a consolidation and dismissal mechanism that EEOC uses to deal with the frequent filers. Could you tell us a little bit more about that consolidation and dismissal mechanism, as I think you term it?

Mr. CASELLAS. Well, I think in the case of an individual, we had individuals who have—it used to be the case that—we are operating on a lot of old information. It used to be the case where you had individuals that would file up to 30 complaints and continue to do that. There are fewer and fewer—in fact, I don't think there are any that are in the teens. There may be a handful of them that file five or six and those get thrown out very early on.

The same thing with the administrative complaints. The administrative judges can essentially rule from the bench, so there's no delay, there's no additional cost because the administrative judge just simply says, you are out of here.

Again, I am not sure.

Mr. MICA. Do you think there's adequate authority to deal with these situations?

Mr. CASELLAS. Yes.

Mr. MICA. I heard that there was one EEOC employee who filed hundreds of complaints of discrimination against EEOC. Is that correct?

Mr. CASELLAS. That might have been under a previous chairman. I will tell you that in the 13 months that I have been there, the number of EEOC complaints has dropped significantly. We are now 68 percent of what it was a year ago, and 25 percent of the cases fewer than were pending a year ago, and we are looking at an internal ADR. So that our percentage of those kinds of things are

dropping, just as our grievances from employees that don't relate to EEOC have dropped dramatically in this year. And that just proves the point, I think, that was made earlier, that you have got to deal with it in the workplace. I mean, you can't let things escalate into—into the sort of more formal process.

So I brought with me the years of private—all of my experience was in the private sector. So I brought that experience to bear, and we have attacked those things at the outset and not allowed them to escalate into a formal charge or formal grievance; and I think that that's what we are encouraging Federal sector agencies to do. We have no enforcement power vis-a-vis the Federal agencies, as we do in the private sector. So all we can do is cajole and encourage and monitor their performance.

Mr. MICA. Well, GAO testified in the previous panel that Federal employees file complaints at a rate of 10 times the private sector. Is there something Congress could do to lessen the filings? Should there be some type of a fee? Should the loser pay? Should there be, you know, some of the costs—should there be something done to discourage some of this? Or do you think this should be a standard operating procedure?

Mr. CASELLAS. Well, I question the premise that certainly the number of charges that are filed in the private sector is one number. That doesn't represent the universe of cases out there, nor does it represent the number of EEO issues that get resolved before a formal charge.

In addition to that, there are 179 State and local fair employment practices agencies which themselves process nearly 100,000 cases of employment discrimination a year.

So the question is, what numbers we are using and are we really comparing the same things?

Mr. MICA. Well, now I will get back to you.

Ms. Segal, I would like your additional criteria and we will add that——

Ms. SEGAL. Thank you.

Mr. MICA [continuing]. To our little agenda items.

I will yield now to the ranking member, Mr. Moran.

Mr. MORAN. Thank you, Mr. Chairman. It was impressive testimony by all four people involved, and it makes it clear why it would be difficult to consolidate some of these appeals processes, because from each of your perspectives, you are fulfilling an essential function and not as duplicative a function as we might be led to believe by outside agencies' observations and reports.

Mr. Casellas, you gave some impressive testimony loaded with facts and figures to dispute some of the assumptions that are going around; but some of those assumptions seem to be borne out by facts as well. In 1992 and 1993, for example, the complaints that were filed by employing agencies went up almost 40 percent. The requests for an EEOC hearing went up by 85 percent. The appeals to EEOC of agency decisions went up by 42 percent. That's just in a 2-year period.

I find it hard to believe that the incidence of discrimination went up by that proportion. In fact, some might suggest that the incidence of discrimination actually went down, in other words, acted in inverse proportion to the number of complaints.

Do you have any numbers for how many of those 25,000 complaints filed with the agencies, for example, were dismissed? Or any numbers as to the amount of time that they took, on average?

Mr. CASELLAS. Well, I have attached to my written statement statistics of counseling contacts, then the formal complaints and the resolutions and the hearings; and of course, the fact that a formal complaint appears in 1 year doesn't mean it was necessarily resolved in that year, if it came in the later part of the year, so it's hard to track it exactly.

But the number of formal complaints has increased. I don't know whether to attribute that to more discrimination or more awareness of it.

I look back at my experience; before I came to the EEOC, I served as general counsel for the Department of the Air Force, and we noted in 1 year that the number of sexual harassment complaints had jumped some 60 percent. It also happened that the year before, we had conducted in the Air Force sexual harassment awareness training for some 170,000, 200,000 of our employees worldwide. So one might argue that the heightened awareness brought about the increase. It's just—it's hard to tell from this.

I will tell you, in terms of the processing time, that that has dropped as a result of the procedures, that the 180 days is being—we are reaching that goal much faster with regard to the internal reviews and hearings that the agencies themselves are doing. Our own time is about the same, going up a little bit, just because the volume has increased and our number of people handling them has stayed the same. So the burden on individual administrative judges and attorneys has increased, but at least the time period that the agency themselves handle these cases has dropped.

Mr. MORAN. That's encouraging, but when the quantity has increased as much as it has——

Mr. CASELLAS. Right.

Mr. MORAN [continuing]. It's not necessarily comforting. And, you know, a neutral observer looking at the numbers might conclude, well, gosh, since the Clinton administration took over, the incidence of employment discrimination has gone up by almost 50 percent, which I think might be a hard case to prove, but the alternative is simply that there has been a greater accommodation to discrimination complaints, more sensitivity awareness and all. But it is a problem when GAO suggests that—well, not just suggests—said that there's a great deal of inefficiency and duplication between MSPB and the EEOC in the first place, and then has also told us that the EEOC discrimination complaints has climbed rapidly and is a real problem.

I have to say that I do think that there is a problem within both the private and public sector that concerns me, and it's a situation where the perception creates a reality that is troubling; and that is that when a manager wants to hire a minority person, there is a factor that can only be considered a disincentive, and that is that the minority person is far more likely, at least in their perception, to file a discrimination complaint if they do not work out. In other words, there's a perception that you have to treat minorities with kid gloves more so than you would a white person, because of the processes available for racial discrimination complaints, and that

can mitigate against qualified, good, needed people from advancing or getting into the positions that they ought to be in.

And I guess the way that you might get at that, discerning whether this is perception or reality, is to take the proportion of minorities within the public sector work force and in the private sector work force—obviously it's a lot higher in the public sector work force—and then take the proportion of personnel complaints and see whether that proportion is significantly greater than the proportion of people in the work force. Then the only argument would be that, in fact, racial discrimination is the sole attributable factor to the difference in those two proportional numbers.

Can you comment on that?

Mr. CASELLAS. Well, I point out—I would——

Mr. MORAN. Do you think it's a problem, in the first place?

Mr. CASELLAS. Well, I—whether that perception exists, it probably does in some places; I point to the private sector. You know, we deal with some 33,000,000 employees and 600,000-plus private sector employers, and I can point to some model employers who have very good records with regard to women, minorities, people with disabilities, who have their own, "private justice systems," in a sense, ADR, internal ADR and mediation that work. And so it's hard to generalize that that perception is one that is so pervasive and prevailing that it is causing managers to stop doing things that they need to do.

I point out, as I did in my statement, though, that we don't see any larger numbers of resolutions, that is, proportionally higher resolutions, of those personnel issues, evaluation issues, that involve discrimination complaints as well. So empirically we don't have any proof that that perception is borne out in terms of how people are being evaluated and whether those evaluations are, in fact, based on performance as opposed to something illegal under the civil rights laws.

Mr. MORAN. Yes. Well, that's interesting. The perception is clearly real; whether the—what it's based upon is. I would like to see some numbers if we have them available.

I just have one further quick question, Mr. Chairman, of Ben.

Chairman Erdreich, you have seen the GAO report, particularly where it deals with mixed reviews. Would you agree that we ought to try to do away with the mixed reviews?

Mr. ERDREICH. I avoided that answer last time, Jim.

Mr. MORAN. I know. That's why I am trying again.

Mr. ERDREICH. I don't think it's my role to make that policy judgment. I would agree, though, with what the chairman of the EEOC said, that there are a small number of cases that end up in this box of this review. We haven't had a special panel in 10 years. And in the last year, my number was—140 cases went from us to EEOC, and they disagreed with one of those cases, and we deferred to them, as we have done over the last 10 years.

I honestly don't think it's a big problem, and I don't think the curing of the problem is going to in any way change this large structural system we have of dealing with disputes. So I would like to avoid the answer again.

Mr. MORAN. I see. Well, you just did. But I only suggest that it's not just the quantity, because you can—you can throw out a num-

ber of questions, but it's really the quality of time that is taken and the disruption that occurs within the executive branch. You could have one case that can take as long and be as complex and be as inefficient in terms of people's time in 140 cases. So it's really the impact in terms of your resources and the effect it has on the agency.

My time has expired. Thank you, Ben.

Mr. MICA. I thank the gentleman.

I would like to yield now to Mrs. Morella for questions.

Mrs. MORELLA. Thank you. I do also feel that the testimony that all of you have provided, both written and oral, have been quite exemplary and well done and I congratulate you for it.

I wanted to pick up on the point that I had raised with Mr. Bowling with regard to the discrimination situation, understanding, Mr. Casellas, that the EEOC is conducting this assessment. And I wondered if you might be able to clarify for this subcommittee, what will it consist of? Will it indicate what kinds of discrimination complaints?

You made the statement that—and obviously it's true, when you look at the statistics, you can see women and minorities just don't have the upward mobility and are all down on the lower levels, but I don't know whether those are the discrimination cases.

I would be interested. Is it handicapped or are there other things? I wondered if that study was going to include that. I wonder if it will also include the fact that in your testimony also, and in the accompanying chart, you indicate the number of counseling contacts has been significantly reduced, maybe by 20,000, and yet the number, the percentage of the people who go formal has in—really increased proportionally, and I just wondered if that might say something also that that study is going to uncover. I just wondered if you could tell us about that.

Mr. CASELLAS. Yes. The review is being done by my office and myself as chairman. It is similar to a review I did when I first arrived, with the help of the other commissioners, on the entire private sector process. We looked at ADR for private sector. We looked at our internal charge processing system to make that more efficient to go to priority charge handling, to send things out to the field, to eliminate needless processes; and we looked at our relationship with State and local agencies.

So the Federal sector process will be just that, just a process analysis. We are not looking at the agencies and the nature of the complaints that are coming from them, as much as how we can make our process more efficient; whether we can eliminate steps; whether we can streamline that process. So it's more of an internal-to-EEOC review. There are numbers of—people over the years, including GAO, have looked at Federal sector discrimination complaints and the nature of those complaints. We are not looking at that. We are looking again at ADR, on the Federal sector side, both internal-to-EEOC, and would probably suggest the same, assuming that's what comes out of this review to the Federal agencies.

Mrs. MORELLA. I think it would be significant—maybe it's too late for us to include it, but I think it would be appropriate for us to determine how there have been—what kind of changes have taken place and what does it reflect and does it tell us that there's

something more that should be done with regard to productivity and morale in the Federal sector. If you uncover any of that, I hope you share it with us.

Mr. CASELLAS. Absolutely.

Mrs. MORELLA. We may want to have GAO follow through in some way if we articulate some questions for them to look at it.

But for all of you, just one question: What recommendations have been developed as a result of the National Performance Review recommendation HRM 08? That came out a couple of years ago, and I am curious about what recommendations may have been developed. Whoever wants to start.

Mr. ERDREICH. Not me.

Mrs. MORELLA. Does anyone want to address it? That's the one to improve the processes and procedures established to provide due process in the workplace for employees.

Mr. ERDREICH. Is anybody going to answer?

Go ahead.

Mr. CASELLAS. I am sorry. I don't, and I am not familiar with what you referred to.

Mrs. MORELLA. I think it—you know, it's the HRM 08. I think it's like human relations management organization.

Mr. MORAN. Would the gentlewoman yield for a second?

Mrs. MORELLA. Certainly.

Mr. MORAN. I think it was simply to bring all of these agencies together and sit them down and see if you couldn't consolidate some of the functions. It was an important MPR recommendation.

Mr. ERDREICH. Certainly it was a recommendation that was never signed off on, if that's the one that was—it was in an initial MPR recommendation. The administration never signed off and triggered our doing that.

Mrs. MORELLA. Maybe we should do something about that, Mr. Chairman.

Mr. MORAN. You are doing it right now.

Mr. ERDREICH. But I am sure this committee and Congress should know that all of us frequently sit down and chat about our mutual problems and concerns and look for ways we can better handle these disputes. It isn't like this is the first time we have sat down together.

But, again, that was never triggered. It was an idea that didn't get the green light.

Ms. SEGAL. I would like to suggest, I am sure that we are all involved in implementing many of the MPR recommendations—I know we are inside our agency—to make it work better. That particular recommendation was not implemented.

Mrs. MORELLA. Maybe we will do something about it.

Thank you, Mr. Chairman. Thank you all very much.

Mr. MICA. I yield to the gentleman from Pennsylvania, Mr. Holden.

Mr. HOLDEN. Thank you, Mr. Chairman. I apologize to the panel for being late and not hearing all of your testimony.

But, Mr. Casellas, you just mentioned ADR. I believe from reviewing your testimony that many of you said ADR is an approach to reducing workplace conflict and the number of administrative appeals filed. I was just wondering how each of you feels. Can you

give examples of how your agency is already using ADR and do you see any down side from expanding the use of it?

Mr. CASELLAS. Well, we have just adopted, for this fiscal year, the use of ADR in the private sector part of what we do; and the question is whether the appropriations will be there for us to implement it, to do it effectively. But we will do it on a pilot basis. We can't do it throughout the agency.

We have—I am currently reviewing the Federal sector side, and I suspect that what's going to come out of that is a recommendation for greater use of ADR in that context. On the private sector side, the ADR we are talking about is voluntary mediation-based ADR.

Mr. ERDREICH. At MSPB, of course, we are like a court. We receive disputes that come to us. But my predecessor, who you are going to hear on the next panel, Dan Levinson, as chairman, began an accelerated settlement effort of cases that initially were appealed to us and we, of course, continue that effort. We settle about half of the disputes that begin—that come to us that haven't been dismissed, so that we have got a major settlement effort.

And when I came in as chairman, I started also a settlement effort at our appellate review level so that we are seeking to get the parties to resolve the disputes. But, again, they already come to us as disputes. It has to—must begin at the workplace, which is beyond our domain, though there may be some linkages that Congress could put in place that would encourage ADR before it comes to us. But that's just a suggestion that Congress could do.

But as far as when it—the dispute begins in our domain, we have a major settlement effort to try and resolve them, with the parties resolving their own disputes.

Ms. SEGAL. The FLRA, we have an agency-wide emphasis, as well as a program on increasing the use of interest-based problem-solving techniques in the workplace, and alternative dispute resolution techniques to formal adjudication.

We have essentially a three-part strategy. One is to give the agencies and the unions that represent Federal employees the tools to use to solve problems themselves. The second part of the strategy is to directly intervene in their disputes if they—if some assistance in the mediation or facilitation mode will help them. And the third part of the strategy is to create a clear and stable law.

My experience as a private sector mediator taught me very persuasively that if the shadow of the law isn't clear, it's very hard to get alternative dispute resolution within it.

We have lots of examples of success. In our representation area, an intervention this past year by our Office of General Counsel, in one facility that had filed some 65 representation petitions, 50 of those petitions were withdrawn because the parties were able to resolve the problems by talking to them—talking to each other.

At our Federal Service Impasses Panel, 12 percent—there has been a 12 percent reduction in cases where the panel has had to impose a collective bargaining term. And that's because of the panel's work in encouraging parties to come to agreement themselves.

We had a 30 percent reduction in unfair labor practice charges filed over the last—the last 2 years, and we believe there is a direct

correlation between those and our training and intervention with parties to give them interest-based problem-solving tools.

We are also encouraged by the early results from a pilot project we launched about 4 months ago where our Office of Administrative Law Judges, who act—who hold hearings on unfair labor practice complaints, is intervening to help parties resolve their disputes. In the 3 months it's been operating, they have settled 76 percent of the cases where it has been ripe to intervene. That's translated to 32 fewer trials over that 3-month period. Each one of those trials costs us money, costs the agencies money, costs everybody concerned an expenditure.

So we believe all of those, as well as there are many other examples, add up to significant savings in dollars and in the ability to rededicate our time in the Federal Government to performing our mission instead of to fighting with each other.

Mr. HOLDEN. Thank you.

Ms. Segal, this is a followup question. I believe in your testimony you indicated that making changes in the appeals system while the government is in the midst of downsizing and decentralizing and restructuring would not be prudent. Can you explain what you believe the adverse consequences, what you would foresee, should reform of the system be undertaken right now?

Ms. SEGAL. Well, any—any reform, any particular structural reform, involves some disruption in the work that's already going on. It's an inevitable result unless—I guess I won't say it's never possible to design something that gives you a seamless web, but I am assuming any time you move anywhere, you know that as a householder, there is a disruption in what you normally do.

At this point in time, each of the agencies either is or is anticipating an increase in their workload as a result of activities going on elsewhere in the agencies. Just one example is our representation petitions. We are anticipating reorganizations throughout government will result in an increased number of petitions filed to clarify what are appropriate bargaining units in the—and who should succeed as the representative in the agencies as they are reconfigured. We are in the process of promulgating new regs, in anticipation of that, to be able to handle those better.

Any time disputes are increasing, the need for dispute resolvers increases and the cost of delaying that resolution may be felt inefficiently elsewhere in government.

Mr. HOLDEN. Thank you.

That's all, Mr. Chairman.

Mr. MICA. I thank the gentleman.

I think I heard the Chair of the MSPB, Mr. Erdreich, comment that you were trying to settle some of the disputes and problems in the workplace at a lower level. And then I think I heard the Chair of EEOC, Mr. Casellas, say the same thing.

Mr. Casellas, one of the things I wanted to wrap up with here is, I have an Office of Federal Operations, EEOC report, and it's the Federal complaints statistics from 1984 to 1994, and it cites in the 1980's, like 1984, the counseling contacts—this would be resolution, I guess—and attempts to contact counseling at a lower level, some of these disputes, 84,000, 86,000, 83,000, 79,000, mostly in the high 70's or 80's; that's from 1984 to 1992.

In 1993 and 1994 we dropped to the 67,000 and 68,000. So we have actually fewer attempts to resolve some of these problems at the counseling or the contact level. And then formal complaints, you have in the 1980's, 1984, for example, is 17,900. Some are 15,000, 16,000, 17,000.

When you get up to 1993, you are at 22,000; and 24,000 in 1994. So it seems that your intentions to resolve these at the lower level or the workplace are fine, but in reality, you have much fewer contacts, according to your statistics, and counseling at the workplace level, and many more formal complaints being filed.

What's the situation here? Is this an accurate reflection of what's taking place?

Mr. CASELLAS. Well, these are accurate numbers. These represent individuals who show up in their agencies because the first step in the process is, you do this counseling contact. You can't file a formal complaint unless you do this, unless you have this counseling contact.

There are fewer counseling contacts, you are right, which may suggest that those people who were filing, "frivolous complaints" earlier on, are not doing that; that there are fewer people beginning that process. And, therefore, there are proportionately stronger numbers of the ones that are less frivolous.

It's hard to know because these are—these are spread—these are agency statistics; these are not EEOC contacts, per se. These are Federal—you know, DOD and Commerce and wherever else they come from—and we simply collect them and show what the formal complaints are at the agencies, as well as the counseling contacts at the agencies. You are right, I don't know what to attribute it to except if you look at the number of counseling contacts, it has dropped. That could suggest that fewer people with less strong cases are coming forward now.

Mr. MICA. Well, it also concerns me that we are not attempting to resolve some of this at the workplace level; that, in fact, we are getting formal complaints at a 30 percent higher rate in the last couple of years; that more people are going to formal complaints which—and, again, the 10-to-1 figure versus the private sector, it seems like it's being overused and possibly abused in the Federal workplace.

So it becomes a concern, at least from the numbers.

Mr. CASELLAS. Right. I mean, it remains a—it remains a complaint-driven system, as it is in the private sector. And unless you are going to change the statutes so that Federal employees don't have the right to initiate in the first instance a complaint, we are going to respond to the complaints; and what we are trying to do internally at EEOC in terms of how we do this is to make the process as streamlined and as efficient and as effective as possible. But we are not suggesting that you close the door to Federal employees with regard to their rights.

Mr. MICA. Thank you. We may have additional questions.

Ms. Segal, in your testimony you said that there are only two limited opportunities for jurisdictional overlap between FLRA and other agencies. Could you elaborate on that briefly?

Ms. SEGAL. Yes. Let me start by clarifying that none of these overlaps have been in the context of Chapter 43, or Chapter 75 ac-

tions. Section 7116(d) of our statute, that's in 5 U.S. Code and section 7121, take us out of the Chapter 43/75 arena. Outside of that, there are two narrow situations, only one of which has resulted in any cases that I am aware of, and that has to do with individual employees raising protected class discrimination claims, such as a Title VII claim, and electing to do so through a negotiated—a negotiated grievance procedure. If at the end of the first stage of the grievance, their union chooses to seek arbitration, there are some such cases which will then, after arbitration, be appealed to us, exceptions taken to the arbitration awards. Because those cases involve protected class discrimination, there is the potential for a sequential review by the EEOC. This category of cases accounts for less than 1 percent of our case workload, and since our cases are less than half of our agency workload, it really is very de minimis in proportion to what we do.

Chairman Casellas reported from his records that, I believe, there were four such cases in the past 2 years where decisions by the Authority on protected class discrimination, arbitration exceptions, were subsequently appealed to the EEOC.

The second limited opportunity has to do with our unfair labor practices. There are occasions where the same personnel action might give rise to a prohibited personnel practice action brought to the Office of Special Counsel adjudicated by the MSPB and because, for example, it also involved what's claimed to be a unilateral change in working conditions, it might raise a bargaining issue which then gets fashioned as an unfair labor practice charge filed with our Office of General Counsel.

I am not aware of cases where that has happened. That's another narrow potential exception. Obviously, in the example I have illustrated, one deals with an individual issue and the other is an institutional issue and it really illustrates the extent to which our agency focuses on the institutional relationships between unions and agencies.

Mr. MICA. Well, I thank you for your comments.

I may have additional questions for all of the witnesses, and because our time is running out, we would like to submit them in writing and ask you to respond. We also look forward to working with you. You are all leaders in your own right and very important areas of this process, and I really don't have any fixed opinion on what should be done. We are trying to find out what improvements can be made using the criteria that I set forth and also the important criteria that Ms. Segal established for us, that we look at the cost effectiveness of the process, and to make it work the way it should work and make it respond the way it should respond.

So we will look forward to working with you in that regard.

I will excuse the panel. Thank you for your outstanding testimony today and cooperation.

[The information referred to follows:]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424
(202) 482-6500

Phyllis N. Segal
Chair

December 6, 1995

The Honorable John L. Mica, Chairman
Subcommittee on Civil Service
Committee on Government Reform and Oversight
U.S. House of Representatives
B371-C Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Mica:

Per your request, enclosed are charts reflecting the FLRA's workload over the last ten years. We request that these charts be placed in the record, along with the written statements submitted at the civil service reform hearing on November 29.

Thank-you again for the opportunity to appear before the Civil Service Subcommittee to testify about federal workplace disputes. As we discussed at the hearing, reforms designed to reduce the costs of conflict will, if they succeed, produce important benefits for both federal employees and the American taxpayer. These benefits include cost savings associated with reduced litigation, as well as increased productivity and customer service.

The FLRA is dedicating itself to achieving these goals. We have developed new programs aimed at improving the relationship between managers, unions and the employees they represent and helping them resolve "problems" themselves, before they become "cases." Although we have only started these efforts in the last two years, early indications show they work. Thus, for example, enclosed are charts which illustrate the results achieved in the unfair labor practice area. They show a:

- ***Reduction in Unfair Labor Practice Charges:*** 28% decrease in unfair labor practice charges filings in the last two-years;

- ***Reduction in Unfair Labor Practice Complaints:*** The 402 unfair labor practice complaints issued in fiscal year 1995 was the lowest number of complaints issued in the last ten years. Indeed, it is 43% lower than the average number of complaints issued during this ten year period;

- ***Reduction in Unfair Labor Practice Hearings***: The 52 unfair labor practice hearings that were held in 1995 represent the lowest number of unfair labor practice complaints litigated in the last ten years and is 57% lower than the average hearing rate for this ten-year period.

- ***Increased Settlements:*** 47% of all unfair labor practice charges filed during the last two years were settled either during investigation or after issuance of a complaint. This reflects a 14% increase in the settlement rate over the average settlement rate during this ten year period.

In addition to alternative dispute resolution efforts, the significant reductions in the unfair labor practice area are also due, in part, to the new Prosecutorial Discretion Policy utilized by the General Counsel which sets criteria for dismissing certain unfair labor practice charges because litigation does not effectuate the purposes of the Federal Service Labor-Management Relation Statute. The increase in settlements is similarly due in part to the General Counsel's Settlement Policy, which is dedicated to helping the parties work together to resolve their own disputes short of litigation, and to the pilot pre-trial project instituted in June, 1995, in our Office of Administrative Law Judges.

These are just a sampling of the indicators reflecting how the FLRA and the parties we serve are successfully reducing the costs of workplace conflict. Our experience at the FLRA gives me confidence that if we set our sights on reducing the costs of federal workplace disputes, we can increase the effectiveness and efficiency of our government. We welcome the opportunity to work with you and the other Members of the Committee on this important endeavor.

Sincerely,

Phyllis N. Segal

Enclosures

cc: Hon. James P. Moran, Ranking Minority Member

FEDERAL LABOR RELATIONS AUTHORITY
CASE STATISTICS FISCAL YEARS 1986 - 1995

	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
UNFAIR LABOR PRACTICES										
CHARGES										
Charges Filed with the Office of the General Counsel	5,205	5,815	6,093	6,451	7,097	7,327	8,848	8,674	7,448	6,252
Withdrawals of Unfair Labor Practice Charges	1,854	2,014	2,124	2,326	2,484	2,584	3,044	3,129	2,188	2,081
Dismissals of Unfair Labor Practice Charges	1,393	1,470	1,286	1,287	1,209	1,111	1,514	1,799	1,129	1,394
Appeals of Dismissals to the Office of the General Counsel	474	584	484	475	459	386	533	539	417	474
Office of the General Counsel Decisions on Appeals	485	521	521	472	416	413	422	371	628	575
Settlements (Pre & Post Complaint)	1,250	1,348	1,626	1,821	2,269	2,675	2,970	3,089	3,802	2,957
COMPLAINTS										
Complaints Issued by the Office of the General Counsel	550	849	870	955	861	855	909	657	957	402
Cases Before Administrative Law Judges	596	894	915	1,069	919	955	723	463	696	417
Hearings Before Administrative Law Judges	108	117	123	101	89	75	112	82	57	52
DECISIONS BY ADMINISTRATIVE LAW JUDGES										
Cases Closed by Administrative Law Judge Decision	109	172	172	152	136	118	119	92	104	115
CASES BEFORE THE AUTHORITY										
Cases to the Authority	129	249	228	160	128	145	139	121	93	89
Decisions by the Authority	163	295	209	92	147	213	151	117	84	75
REPRESENTATION CASES										
PETITIONS FILED WITH THE OFFICE OF THE GENERAL COUNSEL	319	292	336	328	337	333	509	553	600	488
DISPOSITIONS BY THE OFFICE OF THE GENERAL COUNSEL	313	283	336	313	340	305	460	469	622	458
APPEALS TO THE AUTHORITY	19	17	20	21	28	23	25	22	25	19
DECISIONS BY THE AUTHORITY	19	19	16	8	41	28	21	23	26	14
BARGAINING IMPASSES										
IMPASSES TO THE FEDERAL SERVICE IMPASSES PANEL	143	175	259	244	280	293	253	247	178	170
DECISIONS BY THE FEDERAL SERVICE IMPASSES PANEL	142	145	257	222	248	275	264	280	222	177
NEGOTIABILITY CASES										
APPEALS TO THE AUTHORITY	164	156	161	176	127	128	115	95	43	66
DECISIONS BY THE AUTHORITY	187	242	196	87	141	196	148	99	61	27
ARBITRATION CASES										
APPEALS (EXCEPTIONS) TO THE AUTHORITY	228	221	204	197	209	203	188	180	161	104
DECISIONS BY THE AUTHORITY	239	229	191	52	272	268	201	182	170	80

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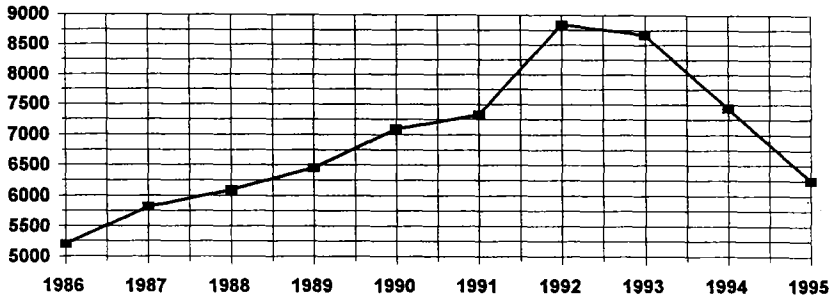
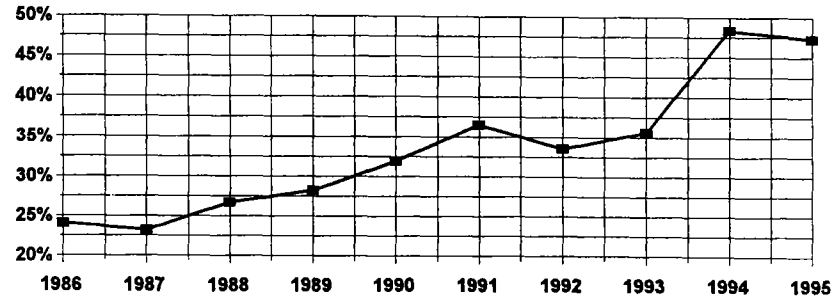
Federal Labor Relations Authority
Office of the General Counsel

Unfair Labor Practice Charges Filed, FY 1986 - FY 1995



There has been a 28 % decrease in unfair labor practice charge filings in the last two years.

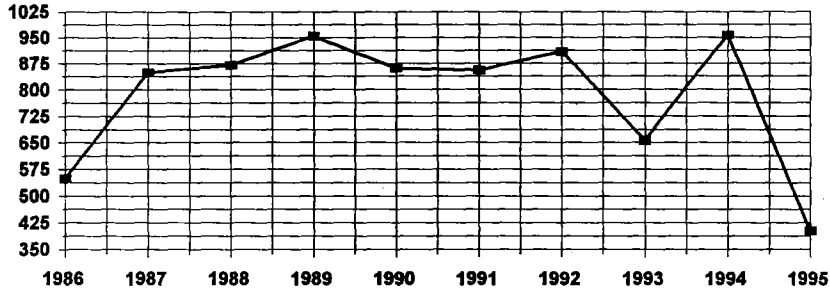
ULP Settlements as a Percentage of Charges Filed, FY 1986 - FY 1995



47% of all unfair labor practice charges filed during fiscal years 1994 and 1995 resulted in settlement either during the investigation or after issuance of a complaint. This reflects a 14% increase in the settlement rate over the average settlement rate for the ten year period.

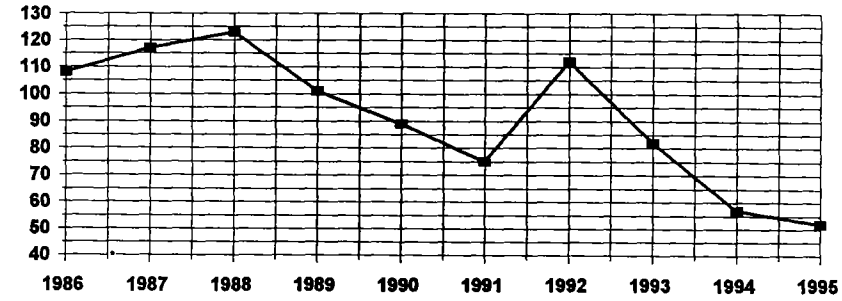
Federal Labor Relations Authority
Office of the General Counsel

Unfair Labor Practice Complaints Issued, FY 1986 - FY 1995



402 unfair labor practice complaints were issued in fiscal year 1995, the lowest number of complaints issued in the last ten years. This number is 43% lower than the average number of complaints issued during this ten year period.

Unfair Labor Practice Hearings Conducted, FY 1986 - FY 1995



52 unfair labor practice complaint hearings were held in fiscal year 1995, which is the lowest number of unfair labor practice complaints litigated in the last ten years and is 57% lower than the average hearing rate for this ten year period.

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

December 5, 1995

The Honorable John L. Mica
Chairman
Subcommittee on Civil Service
House Committee on Government
Reform and Oversight
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to discuss the very important subject of the Federal employee appeals structure. As I said at the hearing, I pledge my cooperation with the Subcommittee as it continues to examine the issue.

I was pleased to hear that the Subcommittee will be guided by the principles enunciated at the hearing as examination of the appeals process goes forward. I would only add that, as a basic consideration, the guiding principles be merit based. Merit is the fundamental underpinning of any civil service system and should be the ultimate goal of any changes to the process.

I am writing to answer two questions posed during the hearing and to add a thought regarding alternative dispute resolution (ADR).

At the hearing, I promised to provide specific information about the number of reduction-in-force (RIF) and retirement appeals. The number of RIF appeals has increased dramatically since 1993 when I became Chairman.

Year	RIF Appeals	Percent of Total Appeals	Increase over prior year
FY 1995	2,303	24%	252%
FY 1994	654	9%	93%
FY 1993	339	5%	

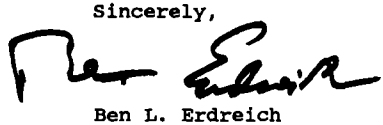
In FY 1994, retirement appeals were 26% of the Board's total workload, up from 17% in FY 1993. In FY 1995, retirement appeals were 15% of the total workload.

I was also pleased to hear questions during the hearing about ways disputes might be addressed as they arise in the workplace before they reach the litigation stage. I think there is significant opportunity in this area.

The Administrative Dispute Resolution Act of 1995 (ADRA), S. 1224, would, for the first time, apply to actions alleging prohibited personnel practices under 5 U.S.C. 2302(b)--including discrimination and reprisal for whistleblowing. S. 1224 would make alternative dispute resolution (ADR) a permanent part of the tools available for dispute resolution in the Federal sector (the original ADRA sunsetted this year). The Senate Subcommittee on Oversight of Government Management and the District of Columbia, Committee on Governmental Affairs (Chairman Cohen), held a hearing on S. 1224 at the same time the Civil Service Subcommittee was considering the dispute resolution process. Staff may want to follow up to ensure implementation of the ADRA addresses the interests of the civil service and the Subcommittee.

Again, I look forward to working with you as you continue the careful and detailed study this subject requires. Please let me know if my staff or I can assist you in your efforts.

Sincerely,



Ben L. Erdreich

THE CHAIRMAN

U.S. MERIT SYSTEMS PROTECTION BOARD
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

December 6, 1995

The Honorable John L. Mica
Chairman
Subcommittee on Civil Service
House Committee on Government
Reform and Oversight
Washington, DC 20515

Dear Mr. Chairman:

The U.S. Merit Systems Protection Board (MSPB) has just completed an end of the year assessment of how well it has done in reaching National Performance Review customer service goals. I am pleased to report that the MSPB has delivered on its promises to its customers despite a significant reduction in staff and a dramatic increase in workload.

In addition to my letter to you of December 5, 1995, I ask that you also add the attached report on the MSPB's customer service to the record from the November 29, 1995, hearing on the Federal employee dispute process.

Again, I appreciate your interest in the Federal civil service and hope to work closely with you and the Subcommittee in the coming months.

Sincerely,

Ben L. Erdreich

Enclosure

MSPB PUTS CUSTOMERS FIRST

The U.S. Merit Systems Protection Board (MSPB) is delivering on promises to improve service to its customers--Federal employees, employing agencies, and the public. MSPB Chairman Ben L. Erdreich said the agency is providing more responsive service despite a 16% reduction in workforce and a 40% increase in workload since 1993. Erdreich cited improvements in several areas of MSPB operations.

- **The Board's customer service standards pledge that initial decisions on appeals of agency actions will be issued within 120 days of receipt and that review by the three-member Board will be completed within 110 days in most cases.**
  - In FY 1995, the MSPB issued initial decisions in 96 days on average.
  - Headquarters decisions also issued within 96 days, an historic performance.
  - This means that the total time from filing an appeal to final decision after full review is just over six months.

- **The Board facilitates settlement of disputes.**
  - In FY 1995, 47 percent of initial appeals not dismissed on jurisdictional or timeliness grounds were settled, avoiding costly and unnecessary litigation and fostering the fair and speedy resolution of issues. The Board expanded its settlement program to apply alternative dispute resolution procedures to cases pending before the full Board.

- **The Board processes appeals in a fair and objective manner.**
  - Typically, 80% of appellants accept the initial decision of the MSPB. Only 20% of initial decisions are appealed to the full Board for review.
  - In FY 1995, of the decisions of the MSPB appealed to the U.S. Court of Appeals for the Federal Circuit, the Board's primary reviewing court, the MSPB decision was left unchanged in 94% of the cases.

- **The Board provides simple procedures.**
  - The Board extended the deadline for filing appeals, allowing employees 10 more days to file appeals in most cases.
  - An appellant may correct a late-filed petition for review by filling out a simple form.
  - Appellants may now file appeals by commercial overnight delivery service.
  - The Board abolished almost 175 pages of unnecessary internal manuals.

- **The Board provides prompt and courteous responses to its customers.**

  - Customers have free, seven-days-a-week electronic access to Board decisions, weekly summaries of cases decided, and summaries of merit systems studies and reviews of OPM significant actions.
  - In notices acknowledging filings, the Clerk of the Board provides appellants with a telephone number and the name of an employee who can respond to questions.

- **The Board studies topics relevant to the effective operation of the Federal merit systems and issues timely reports.**

  - Recent MSPB studies and reports focus on workplace issues particularly significant to NPR goals, such as poor performers in the Federal service, hiring restrictions in the civil service, demonstration projects on employee benefits and leave, classification and pay systems, and the procurement process.

The MSPB is an independent, quasi-judicial agency with responsibility for deciding Federal employee appeals from significant personnel actions taken against them. As part of its mission, the Board is responsible for conducting studies of the civil service and other Federal merit systems and for reviewing the significant actions of the Office of Personnel Management.

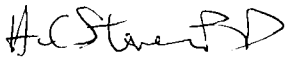
December 3, 1995

The Honorable John L. Mica (R- Fl)
Chairman, U.S. House of Representatives
House Civil Service Committee
Cannon Office Building, Room 338
Washington, D.C. 20515

Dear Congressman Mica:

Please find enclosed a submission for the record of your November 29, 1995 House Civil Service Committee hearings on Federal Employee Appeals System Reform. I hope that you will include this point of view in the Congressional Record of these proceedings and I hope that your committee will consider the content of this testimony in the design of their final reform package.

Sincerely,



Henry Stevenson-Perez, M.D.
11223 Valley View Ave.
Kensington, MD 20895

CC:
Congressman Albert Wynn (D- Md)
Congressman Steny Hoyer (D-Md)
Congresswoman Connie Morella (R-Md)
Congressman Lincoln Diaz Ballard (R-Fl)

CONGRESSIONAL TESTIMONY

The U.S. House of Representatives Civil Service Committee is currently holding hearings in preparation for Congressional reform of the Federal Civil Service Appeals System. According to a November 30, 1995 Washington Post report, Congressman Mica has indicated, "There are too many reasons for employees to file appeals and too many ways for employees to take advantage of the system." The Washington Post article also cites the tendency of federal managers who, while trying to fire or demote "so-called poor performers", have become increasingly prone to settle complaints, "even when the evidence backs them up."

While reform of the federal employee appeals systems is certainly overdue, the reports of the current hearings held by Congressman Mica's committee do not refer to the equally egregious "other side of the story": Abuse by many federal managers of the same employee appeals system. On July 13, 1993, the same Congressional Civil Service Committee, this time chaired by Congressman Albert Wynn, held hearings on the abuses of the federal employee appeals system by numerous managers at the National Institutes of Health (NIH), our nation's largest (18,000 employees) health research institution. As reported in a July 14, 1993 Washington Post report, minority NIH employees complained about being routinely passed over for promotion and then being subjected to unchecked managerial reprisals for having filed discrimination complaints. A follow-up August 10, 1993 "Open Forum on Managerial Reprisal at the NIH" was summarized in the following manner in the August 11, 1993 Report of the NIH Director's Task Force on Fairness in Employment Practices:

> *"The Office of Equal Employment Opportunity (OEO) is a tool of management without real power to resolve discrimination complaints"
> *"Delays and impediments in the process are meant to exhaust victims, both emotionally and financially"
> *"Most commonly, employees were subjected to ... negative performance evaluations in apparent efforts to discredit their abilities"
> *"The (appeals) system protects the managers and not the employees...Personnel procedures are used by management to aid the retaliators"
> *"If employees file EEO claims, their work environment will get worse rather than better...Delays in resolving complaints lead to more reprisal against the complaining employee."

The August 11, 1993 NIH Director's Task Force on Fairness in Employment Practices Report concluded with a request for the NIH Director to establish a more streamlined, more objective NIH EEO complaints process, along with stiff new sanctions for those NIH managers who commit reprisals against complainants. On May 4, 1994, the NIH Director, Dr. Harold Varmus, issued the NIH-wide "Anti-Reprisal Directive"; basically, a "three strikes and you're out" regulation for retaliatory NIH managers. To date, there is

out" regulation for retaliatory NIH managers. To date, there is broad consensus that this new NIH "Anti-Retaliation Directive" has not been effective: Many NIH managers continue to abuse the employee grievance system, by committing unchecked reprisals, especially in the fabrication of inappropriately-low performance ratings against any employee who dares to file a grievance.

The challenge for Congressman Mica's committee is to answer the question, "Why would managerial reprisal against those federal employees who file grievances be a problem at the National Institutes of Health -- our nation's premier health institution -- an organization that prides itself as being an "Agency of Healers?"

The answer to that question lies in the previous testimony that was provided to Congressman Mica's committee in 1993, indicating that "too many federal managers also take advantage of the system.": Simply stated, these managers believe that the appeals system will allow them to get away with such abuse. Unless the upcoming Congressional reform package for our appeals system includes guarantees of impartiality (i.e., the a priori assumption that the cited manager may be just as guilty/deficient as the grieving "poor performer"), the proposed Civil Service Employee Appeals System reform package will only magnify federal government inefficiency, not improve it.

The most straightforward way to eliminate the managerial component of the abuse of the Federal Appeals System would be for Congress to insist on a "Zero Tolerance Policy" against those federal managers that commit reprisal against their employees. Congressionally-mandated "Zero Tolerance" policies have proven effective in curbing sexual harassment at the Navy and in lowering IRS employee "snooping" into the taxfiles of their neighbors, why not give a Congressional "Don't even think about it!" message to federal managers who are contemplating reprisal?

If the upcoming reform of the employee appeals system doesn't also address the well-documented "other side of the story", the ability of our federal agencies to serve the needs of our taxpayers will only be further compromised.

Henry Stevenson-Perez, M.D.

House Chairman Faults Employee Appeal System

By Stephen Barr
Washington Post Staff Writer

House Republicans, looking for ways to save money and strengthen the hand of federal managers, yesterday delved into the appeals system government workers use to complain about unfair treatment in the workplace.

At a hearing held by House civil service subcommittee Chairman John L. Mica (R-Fla.), the process was depicted as inefficient, expensive and time-consuming. "There are too many reasons for employees to file appeals and too many ways for employees to take advantage of the system," Mica said.

Calling the current system overly complex, Mica said the government relied on five agencies and spent about $100 million to investigate and resolve employment disputes in fiscal 1994. "Certainly, we can guarantee fairness to federal employees using simpler procedures without expending so many resources," Mica said.

The General Accounting Office, in its testimony, said that "as things stand today, federal workers have substantially greater employment protections than do private-sector employees." Timothy P. Bowling, an associate director at GAO, said federal employees file workplace discrimination complaints at roughly 10 times the rate of private-sector workers.

But officials from the Merit Systems Protection Board (MSPB), Equal Employment Opportunity Commission (EEOC), Federal Labor Relations Authority (FLRA) and Office of Special Counsel (OSC) offered different perspectives, saying they have already taken steps to make the appeals system work better and faster. The Office of Personnel Management (OPM) said it would not recommend specific changes to the current system without more study.

The agencies could face rough going in Congress next year. A House Appropriations subcommittee has ordered the executive branch to submit a plan by Feb. 1 on how to restructure the employee grievance process, raising the possibility that some of the agencies may be merged. One of yesterday's witnesses, G. Jerry Shaw, general counsel to the Senior Executives Association, said the current system should be replaced with a special federal court to provide a single avenue of appeal.

The current employee appeals system grew out of the Civil Service Reform Act of 1978 and a series of legal and regulatory decisions. The system seeks to protect workers from arbitrary agency decisions and prohibited personnel practices, such as supervisors taking revenge against whistleblowers.

The system's critics argue it hampers agency management because supervisors fear they will be hit with false discrimination claims when they try to fire or demote so-called poor performers. Workers can even file complaints with the EEOC when no particular administrative action has been taken against them, frustrating agency disciplinary actions, according to the critics. Some cases take years to resolve, because employees can take them into federal court after exhausting administrative hearings.

Instead of dealing with a disciplinary case that can drag on for months, federal managers seem increasingly willing to settle complaints even when the evidence backs them up. Such settlements may create troublesome precedents or create ethical dilemmas for managers, the GAO said.

But officials from the MSPB, EEOC, FLRA and OSC testified they focus on different aspects of federal employment disputes and said their rules make it difficult for workers to use more than one legal forum to pursue a complaint.

Out of 12,206 cases received by MSPB last year, only 140 were "mixed cases" that raised issues of discrimination in connection with an appealable personnel matter, MSPB Chairman Ben L. Erdreich said. Of the 140 cases, he added, the EEOC disagreed with one only MSPB decision.

Gilbert F. Casellas, the EEOC chairman, disputed suggestions that federal workers file frivolous discrimination claims and questioned GAO's conclusion that federal employees file complaints at a rate 10 times greater than private-sector workers. The GAO analysis did not cover all possible private-sector cases, Casellas said, noting that state and local agencies process at least 100,000 bias cases each year.

Phyllis N. Segal, head of the FLRA, urged the subcommittee to consider the cost of dismantling the current appeals structure. The agencies do not need their work disrupted at a time when the rest of the government is reorganizing and laying off employees, she said, because downsizing actions will set off a wave of employee grievances to resolve.

THE FEDERAL PAGE
THE WASHINGTON POST THURSDAY, NOVEMBER 30, 1995

The Washington Post

WEDNESDAY, JULY 14, 1993

Officials Tell of NIH Race Bias

NIH Systemically Discriminates, Hill Panel Told

'Hostile' Workplace Described on Hill

By Vanessa T. Aldridge
Washington Post Staff Writer

Officials at the National Institutes of Health joined a parade of witnesses yesterday in telling Congress that the nation's premier scientific research facility is plagued by pervasive, long-standing racial discrimination that has clustered black employees in low-paying jobs with little chance of advancement.

Witnesses told a House Post Office and Civil Service subcommittee that NIH, which employs 14,573 permanent workers at 13 institutes in Bethesda, has a deeply entrenched culture of discrimination in which black workers are routinely passed over for promotion, relegated to clerical or semi-skilled jobs and subjected to reprisals for filing discrimination complaints.

The culture has persisted for more than two decades and spawned hundreds of discrimination complaints, yet no one has ever been disciplined for racial bias, witnesses said.

"Some black employees work on a daily basis in a hostile working environment, where they are harassed, verbally abused, physically assaulted, demeaned, cursed at and harassed to the point that some of them have developed physical and mental disabilities and some resign because they just can't take it any more," Jalil H. Mutakabbir, NIH's black employment program manager, told the panel.

About 120 people packed into the two-hour hearing, many of them current and former employees of NIH. The hearing was requested by Rep. Albert R. Wynn (D-Md.), who said he was frustrated and disturbed by allegations of racial bias raised in May and NIH's failure to quickly eradicate racial problems.

Bernadine Healy, who headed NIH for two years until she stepped down June 30, did not dispute the allegations of systemic discrimination at the agency, but said the agency had tried aggressively during her tenure to correct the "perception and reality" of discrimination.

"We want to promote a pattern of progress, not a record of regret," said Healy, who now lives in Cleveland.

African American employees, at 22 percent, represent the largest minority group at NIH, according to the NIH chapter of Blacks in Government (BIG).

Yesterday, Vincent Thomas, the chapter's president, said the black employees are concentrated in low-paying clerical and technical jobs, resulting in "egregious disparity in wages" between black and white workers.

The average salary for white employees at NIH is $44,615; the average for black workers is $30,889, Thomas told the panel.

Thomas said that white people make a higher average salary in each of the five occupational categories, from clerical up to Senior Executive Service positions. That's because black people occupy the lower grade levels in each category, he said.

"The higher the grade level, the lower the representation of blacks," Thomas said.

Allegations of widespread racial discrimination at NIH surfaced in early May when BIG and the Montgomery County branch of the NAACP staged several rallies at the agency's Bethesda campus.

In the last few months, the Washington Lawyers Committee for Civil Rights and Urban Affairs, working with the NAACP, has initiated a separate investigation into about 70 racial discrimination complaints at NIH.

Healy said she first became aware of the extent of employment discrimination problems at NIH after reviewing a consultant's report that said an "ole boy-younger women network" had flourished for years in the agency's procurement division.

The report said some women had been promised raises or promotions in exchange for sexual favors.

Healy said she was "deeply troubled" by the report, which said the agency's alleged unfair employment practices included not only racial bias, but sexual harassment, nepotism and favoritism.

"I had no idea that the problem was that extensive," Healy testified yesterday.

In May, Healy appointed a task force to examine NIH hiring practices. But yesterday, she said the "culture of the NIH campus" also must be overhauled to promote diversity and equal opportunity for all workers.

"We must foster a culture of respect," Healy said, noting that NIH is a highly competitive workplace where researchers often have a single-minded focus on medical breakthroughs.

Healy said racial discrimination was more difficult to investigate and resolve than sexual harassment complaints.

Last year, 242 informal complaints were filed by NIH workers, most of them alleging racial bias.

"It's harder to put your arms around," Healy said, noting that racial complaints often are anonymous.

Diane Armstrong, director of the equal opportunity office at NIH, acknowledged that the agency has never disciplined a manager for racial discrimination.

Equal employment office records show that NIH has imposed sanctions in 11 cases against supervisors found guilty of sexual harassment.

Gregory Wims, president of the Montgomery NAACP chapter, said civil rights groups want NIH to conduct sensitivity training sessions for scientists, who, he said, often ignore the everyday concerns of clerical and professional staff members.

The NAACP also wants to shorten the complaint review process, which last year averaged 452 days.

Gladys M. Whitted, a contract specialist, testified that she had been denied a promotion for nine years because she is a black woman.

Whitted said supervisors cited budget constraints and a lack of full-time positions in denying her a promotion.

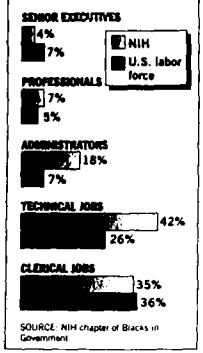
But Whitted said she believed she was "doing an excellent job" and had suffered severe stress and low self-esteem because of the promotion denial.

"I feel that because I am an African American female, someone has decided that I am unworthy of receiving a promotion."

Both the NIH task force and the House Post Office subcommittee will continue to monitor the discrimination issue, officials said yesterday.

NIH WORK-FORCE COMPARISON

Black workers make up about 22 percent of the work force at the National Institutes of Health. The chart below compares the percentage of jobs held by blacks at NIH with the percentage held by blacks in the entire U.S. civilian labor force:



SOURCE: NIH chapter of Blacks in Government

THE WASHINGTON POST

The Washington Post

TUESDAY, AUGUST 10, 1993

Blacks Describe How Bias Hurt Their Careers at NIH

By Veronica T. Jennings
Washington Post Staff Writer

Bent on success at the outset of her career 30 years ago, Sylvia Stewart put her job at the National Institutes of Health in Bethesda ahead of her husband and children. Today, age 54 and stuck in the same job for 24 years, she believes she lost the biggest gamble of her life.

Stewart, a computer systems analyst at NIH's National Library of Medicine, says she believes her career and those of many black co-workers have been stymied by a scientific institution dominated by white males who systematically have denied career opportunities to minorities and women.

Two of Stewart's supervisors say her race and sex played no role in the decisions about her career, but other NIH officials say there have been cases of discrimination at the nation's premier facility for medical research.

"What usually happens to black professionals at NIH is that they are promoted one or two times. Then when they get to the management level, that's where the trouble starts," Stewart said.

Black employees, the largest minority group at NIH, make up 21.4 percent of the permanent work force.

In the last year, hundreds of African American NIH employees have filed discrimination complaints, and the furor reached a peak this spring, prompting a congressional hearing and the creation of a special NIH task force on unfair employment practices. The task force will hold its first open meeting today on examples of retaliation against staffers who filed di crimination complaints.

According to the NIH chapter of Blac in Government, a national organization, A rican American employees are concentrate disproportionately in the lowest-payi jobs, even after a federal study in 1986 th sharply criticized the slow movement blacks into top-level management.

NIH officials have pledged to elimina discrimination. "If there is race discrimin tion at NIH, and it is shown to be true, w

See NIH, A8, Col. 1

will take swift action, and we will wipe it out," said Ruth Kirschstein, acting NIH director.

A review of numerous complaints, as well as interviews with current and former black NIH employees, suggests a number of areas where workers say they have experienced job bias because of their race:

- A number of blacks at NIH say that they are held in their job grades longer than their white counterparts and that they do not receive the same mentoring for top-level jobs.
- Others contend there are wide disparities in pay. The average salary for white employees at NIH is $44 615; for black males, $34,191; and for black females, $29,502, according to statistics compiled by the NIH chapter of Blacks in Government.
- Black workers say they are passed over for promotions that are awarded to whites with less experience, even when African American employees have been rated "highly qualified" for the job openings.

Stewart, who is paid $62,293 a year as a GS-13, said she won her last NIH promotion in 1969 and has applied for six others since then.

"I've seen white males who started out with less than I had in education and background, and they are now at GS-14 and 15," Stewart said. "They have moved up in a matter of years and become my superiors."

A graduate of Morgan State University with a bachelor's degree in mathematics, Stewart said she was hired in 1963 as a GS-9 computer programmer. Stewart said she was elevated to a GS-11 two years later, and to her current grade level in 1969.

Stewart said she served briefly in management in 1971-72 when many white male managers were sent to California to help develop a second-generation computer system. A reorganization of her division in 1973 left her with no employees to supervise, Stewart said.

Since filing a discrimination complaint, Stewart said, she has been ostracized by co-workers. "You lose your self-esteem," she said. "Everybody starts saying you're not capable of doing the job. You start receiving bad performance appraisals," she said.

In 1991, Stewart filed a formal complaint, asserting that four white supervisors unfairly denied her a promotion to a senior computer analyst position. Two of the four countered Stewart's contentions in interviews.

"That's her perception. That's not a fact," said Kent Smith, deputy director of NIH's National Library of Medicine.

Smith described Stewart as a "good employee" who aggressively competes for jobs. "Sometimes she gets selected; sometimes she does not," Smith said. "Everybody wants to get ahead."

"There was no discrimination involved in the Stewart case," said John Cox, a supervisor in the development branch.

According to NIH statistics, the number of blacks in senior executive jobs has increased from four five years ago to eight today, a tiny percentage of the 225 senior executive jobs at NIH.

Blacks are heavily concentrated in technical and clerical jobs at NIH, statistics show. For example, blacks represent 41.7 percent of all technical workers at the agency, compared with about 26 percent in the nation's civilian work force. Blacks make up more than 50 percent of NIH workers in clerical jobs, NIH figures show.

Former NIH director Bernardine P. Healy told a congressional panel in June that the agency has launched several initiatives to improve the retention and promotion of blacks. Healy said that she had appointed the only African American director of an NIH institute and that four of her 16 senior staffers were black.

Johanna Schneider, an NIH spokeswoman, said the rate of promotion for minorities has been consistent with their representation in the NIH work force. For example, according to NIH statistics, blacks have received about 22 percent of the promotions since 1989, while non-minority employees have received 71 percent, she said.

Wesley White, a biologist, said he and several hundred black employees filed a complaint alleging race discrimination against NIH in 1977 with the federal Equal Employment Opportunity Commission. An EEOC spokesman said the agency could not determine the disposition of White's complaint.

White, 51, a graduate of Hampton University, said he was assigned menial, repetitive tasks in an

NIH lab and denied opportunities to work on high-profile research projects.

"I would come to work and have nothing to do, just sit around," White said.

At one point, a female supervisor tried to make him uncomfortable and force him to leave so she could hire someone else, White said in his complaint. According to White, the woman, who had made disparaging remarks about black culture, stormed into a lab, "snatched the experiments out of my hand and asked me to pray and sing hymns with her."

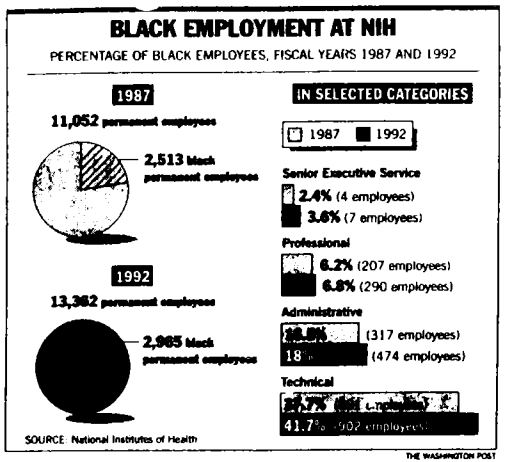
By 1983, after 16 years at NIH, White said, he abandoned his dream of being on a team that would find a cure for life-threatening diseases.

"It does something to the mental state to see others advance faster and farther than you, while you remain in the same spot," White said. "After a while I was so frustrated as a biologist, that I developed an interest in computers."

White left the lab and found a job in analytical chemistry at the National Institute of Diabetes and Digestive and Kidney Diseases, another NIH agency.

White said he's happy with his current job but disappointed at the lack of mentoring and support given to black scientists at NIH. "It's very alarming what I have seen over the past 20 years," White said. "It looks like we, blacks, have lost ground. You look at the labs and see very few blacks. More black PhDs leave the labs for administrative posts."

NIH hired its first two tenured black scientists shortly after a General Accounting Office report was released in 1986, said Vincent Thomas, president of the NIH chapter of Blacks in Government. As of last December, NIH had 13 tenured black scientists, representing 1 percent of its 996 tenured scientists, according to NIH.



Some high-ranking black NIH administrators leave too.

Otis Ducker, 64, said he retired in 1984 "to preserve my sanity." At the time, Ducker, a GS-15, was director of administrative services in the procurement division, where he supervised 600 to 800 employees.

Now a self-employed consultant in Temple Hills, Ducker said that when he came to NIH in 1953, most blacks held jobs as warehouse workers, truck drivers, housekeepers and mailroom clerks. Ducker estimates he held 25 jobs during his 31-year NIH career, starting as a temporary forklift operator.

"In terms of affirmative action efforts, I have seen NIH from the low-water level to the heights and then back down again," Ducker said. African American employees at NIH made the most significant strides in the late 1960s and early 1970s, he said. "Some people did make it over" and become successful, he said.

NIH officials say there was no discrimination against Ducker, but he says the frustrations for him were enormous. "I started to doubt myself," he recalled. "I started to wonder if I was as good as the plaques on the wall or if I was an affirmative action quota."

Ducker applauds the tenacity of his former colleagues. "A lot of people have high hopes that things will get better," he said. "I do hope they are right."

National Institutes of Health
Bethesda, Maryland 20892

AUG 1 1 1993

TO: Ruth L. Kirschstein, M.D.
Acting Director, NIH

FROM: Senior Policy Advisor and Counselor to the Director, NIH, and Co-Chair of the NIH Task Force on Fairness in Employment Practices

SUBJECT: Open Forum on Reprisal and Retaliation---INFORMATION

The NIH Task Force on ~~Fairness~~ in Employment Practices held two sessions on ~~August~~ 10, 1993 to obtain the comments and perspectives of the NIH community on issues related to reprisal and retaliation. The following gives both background and a preliminary summary of comments made in those sessions.

BACKGROUND

In May 1993, Dr. Bernadine Healy, former NIH Director, established the NIH Task Force on Fairness in Employment Practices specifically to respond to allegations of widespread race discrimination, nepotism and favoritism at the agency. The Task Force was given a seven-part mandate to assess the extent to which employment and advancement at NIH are affected by race discrimination, nepotism or favoritism; to evaluate policies and procedures at the NIH to address allegations and complaints of race discrimination and NIH's progress in integrating minorities into all levels of employment and management; to address reprisal and retaliation problems that also appear to be a serious concern at the NIH; and to recommend to NIH leadership solutions to these problems. (See Attachment A for the complete mandate). The Task Force is composed of a broad cross-section of NIH employees. It is representative of senior management as well as mid and entry level professional and support staff and is diversified along racial, ethnic and gender lines. (See Attachment B for a complete list of Task Force members). Members were appointed not to represent particular organizational components of the NIH, but for their personal perspectives and insights.

The Task Force made as its highest priority the assessment of ways in which persons filing informal or formal complaints of race discrimination could be adequately protected from reprisal or retaliation. To assist in that assessment, the Task Force believed that the perspectives of the NIH community should be obtained through structured sessions both of an open and closed nature.

SUMMARY

The Task Force met in two sessions on August 10, 1993 to receive comments and perspectives of the NIH community on issues related to the reprisal and retaliation that might follow the filing of a discrimination complaint or any action otherwise opposing an act of discrimination. The open session was held in Masur Auditorium of the Clinical Center from 8:00 a.m. until 12:45 p.m. Twenty-eight persons participated in that session. The closed session followed immediately in the Medical Board Room. Nineteen individuals made presentations during that session. To focus the discussions, participants were given a set of seven questions to address. (See Attachment C for the questions regarding reprisal and retaliation).

The sessions were useful from a number of perspectives. First, they gave the employees the opportunity to "tell their stories" or to get their concerns "off their chests." In that regard, the sessions were cathartic, although painful because of the intensity of emotion and sometimes desperation of the participants. Second, the sessions demonstrated that the NIH is genuinely interested in the employees' plight and gave them renewed hope that some action would be taken to alleviate their concerns.

In addition, the sessions helped to outline from the employees' viewpoint the types of activities which constituted reprisal or retaliation. For example, after complaining about discrimination some employees were made to pay their own travel expenses to attend meetings or their training or travel opportunities were decreased or eliminated. Others were refused overtime work or their work load was substantially decreased and they were ostracized, sometimes physically, from participation in the normal workings of their office. Others were detailed to different jobs where they were given little or no work. Most commonly, employees were subjected to increased work requirements, special leave restrictions, performance improvement plans, and negative performance evaluations in apparent efforts to discredit their abilities.

Several important themes or perspectives surfaced from both sessions:

1. The Office of Equal Opportunity (OEO) is not an adequate mechanism for dealing with discrimination claims generally or reprisal or retaliation in particular. OEO is a tool of management without real power to resolve discrimination claims. The system is adversarial from the start and not user-friendly. Delays and impediments in the process are meant to exhaust victims both emotionally and financially.

2. Informal "old-boy" networks exist which result in preferential hiring or favoritism.

3. The system protects the managers and not the employees. Sometimes it is not clear where an employee should go for help and what procedures are in place to help employees. Personnel procedures are used by management to aid the retaliators.

4. There are no stiff sanctions imposed for discrimination. Sanctions which exist are seldom imposed because many complaints are resolved without culpability being established.

5. If employees file EEO claims, their work environment will get worse rather than better.

6. Employees filing claims are held to strict deadlines while no deadlines are applied to OEO or other offices involved in processing or resolution of the claims.

7. Delays in resolving complaints lead to more reprisal and retaliation against the complaining employee.

The following are recommendations for improvement which were made by participants in both sessions:

1. The NIH should utilize an independent entity to process EEO complaints.

2. The processing of complaints of reprisal and retaliation should be expedited. The rights of both the complainant and the accused should be protected.

3. Managers should be relieved of control over the complainant during the processing of the complaint.

4. The NIH should establish positive and negative incentives to settle complaints expeditiously.

5. Public and demonstrative action should be taken against discriminators, harassers, and retaliators. Sanctions should include formal reprimands, suspensions, loss of bonuses and awards and removal from office. Accused managers' and supervisors' awards and bonuses should be put on hold until outstanding EEO complaints against them are resolved.

6. The EEO complaint resolution process should involve a mediation phase. The system should be an administrative process, accessible to all employees, rather than a complex and expensive legal process.

7. The NIH should conduct more open meetings.

8. The NIH should establish an independent party responsible for overseeing the training and career development of all employees.

CONCLUSION

The sessions on reprisal and retaliation were both productive and informative. Over two hundred NIH employees participated in the sessions through their direct testimony, or audience attendance both live and through the NIH Town Meeting Network to off-site locations. While it is still too early to judge the employees' perceptions of the forum, initial reaction seems positive and hopeful. The Task Force should continue to conduct open meetings from time to time to demonstrate its continuing commitment to the resolution of EEO problems at NIH.

The information provided to the Task Force at the sessions was enlightening albeit sometimes devastating. From the testimony, it would appear that reprisal and retaliation exist at the NIH, in many forms, stem from a variety of reasons, and cross all gender and ethnic groups.

I would be happy to answer any questions.

Sandy Chamblee

Sandy Chamblee, J.D.

Attachments

DEPARTMENT OF HEALTH & HUMAN SERVICES Public Health Service

National Institutes of Health
Bethesda, Maryland 20892

MAY 4 1994

TO: All Employees

FROM: Director, NIH

SUBJECT: Manual Issuance on Processing Complaints of Reprisal

The National Institutes of Health (NIH) is committed to equal employment opportunity for all of its employees and the creation of a harmonious and effective workplace free of discrimination. The NIH must honor the rights of individuals to participate in EEO activities or to use the Office of Equal Opportunity to address charges of discrimination and must protect all individuals from any reprisal for exercising those rights.

In May 1993, the Task Force on Fairness in Employment Practices was convened to examine issues of race discrimination at the NIH. Reprisal was determined to be the Task Force's number one priority and it immediately undertook the drafting of the attached Manual Issuance on Processing Complaints of Reprisal.

Reprisal is an extremely serious offense, in part because it is a conscious act intended to punish an individual for the exercise of his/her civil rights. The policy was developed in recognition of the need to respond to allegations of reprisal fairly and promptly. It places the responsibility for the resolution of complaints at the highest levels of ICD management and explains the responsibilities and rights of all individuals involved in an inquiry of reprisal. In addition, this policy will strengthen the existing informal complaints process by:

- requiring timely inquiry into employee complaints of reprisal,
- providing for temporary reassignment of the employee or named official during the informal complaint process, as appropriate,
- setting time frames for processing reprisal complaints, and
- imposing sanctions against individuals found to have committed reprisal.

The total caseload of informal reprisal complaints existing prior to the effective date of this policy will be processed within 180 calendar days of the issuance of this policy.

You are encouraged to read the entire document carefully and retain a copy for future reference. If you have any questions regarding the policy, please direct them to your EEO Officer or the Office of Equal Opportunity.

The NIH will continue to examine and re-evaluate policies and procedures in other areas of equal opportunity. The NIH is committed to taking the steps necessary to ensure a fair and equitable opportunity for all individuals to fully utilize their talents and capabilities, and to create a work environment where no one is denied the opportunity to fully contribute.

Harold Varmus

Harold Varmus, M.D.

Attachment

PROCESSING TITLE VII COMPLAINTS ON REPRISAL

Table of Actions for Misconduct
Related to Informal Complaints of Reprisal*

First offense: 14 calendar day suspension to removal
Second offense: 30 calendar day suspension to removal
Subsequent offense: Removal
Additional management actions must include but are not limited to:
special counseling, training

***These actions apply to named officials and, as appropriate, to managers and supervisors who knew or should have known about the reprisal actions of their subordinates but who, in turn, took no action to address the issue. A penalty lesser than those included in this table may be proposed to a deciding official, or imposed by a deciding official, if there is evidence of substantial mitigating circumstances.**

Mr. MICA. We have a vote with just a few minutes left in the vote.

We will take a recess for 15 minutes. I will call the next panel at that time, and excuse these witnesses, and we will recess the subcommittee until that time.

[Recess.]

Mr. MICA. I would like to call the subcommittee back to order and ask our witnesses in the last panel if you could come forward.

In our last panel we have Mr. Daniel Levinson, former chairman of the Merit Systems Protection Board. We have Llewellyn M. Fischer, former general counsel, Merit Systems Protection Board; we have Jerry Shaw, general counsel of the Senior Executives Association; and Clinton Wolcott, assistant counsel of the National Treasury Employees Union.

I would like to welcome our panelists to this third panel. We have just heard from the status quo. Now we get to hear from some of the Monday morning quarterback team. I would like to welcome our panelists.

As you know, it is customary that we swear in our panels and witnesses. If you stand and raise your right hand.

[Witnesses sworn.]

Mr. MICA. The witnesses answered in the affirmative.

I would like to welcome each of you. Thank you for your patience. We have a long hearing today but an important one, and I think you can provide some good insight.

We will call first on Daniel Levinson, former chairman of the Merit Systems Protection Board, for his testimony, and, as I mentioned to our other witnesses today, if you have lengthy testimony it will be made part of the record, and if you would like to summarize, fine. We welcome each of you, and will proceed with Mr. Levinson.

STATEMENTS OF DANIEL R. LEVINSON, FORMER CHAIRMAN, MERIT SYSTEMS PROTECTION BOARD; LLEWELLYN M. FISCHER, FORMER GENERAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD; G. JERRY SHAW, GENERAL COUNSEL, SENIOR EXECUTIVES ASSOCIATION; AND CLINTON WOLCOTT, ASSISTANT COUNSEL, NATIONAL TREASURY EMPLOYEES UNION

Mr. LEVINSON. Thank you very much, Mr. Chairman.

I would like to begin by noting that I am accustomed to being something of a Monday morning quarterback, because I am a graduate of the University of Southern California. USC gets plenty of opportunity to play in the big league football games, and we spend a lot of our time during the week doing exactly that.

Mr. MICA. I am a former graduate of the University of Florida, so we are feeling our oats as well.

Mr. LEVINSON. See you January 1.

I would like to make my written statement a part of the record——

Mr. MICA. Without objection.

Mr. LEVINSON [continuing]. And make additional comments that would be supplementary to that written statement.

There was reference made in my statement to the Congressional Accountability Act. That was noted as well by the first witness this morning from GAO.

I would like to begin by expressing my sense that what you and your colleagues did on the first day of this session in 1995 was an extremely powerful statement about employment law reform.

Only one of the two powerful statements about labor law reform as a result of the passage of that bill has really been talked about, that being the expression by this Congress that Congress, too, is a part of America's workplace and certain standards of due process should apply in the Congress as well as in other workplaces around the country.

Another important powerful statement made by passage of the CAA was the notion that workplace due process also could be addressed in an integrated, comprehensive way. While I won't get into the particulars of that bill and the purpose of this hearing is not to explore the Congressional Accountability Act in any detail, it is worth noting that that bill creates essentially one office to address more than a dozen of the Nation's most important Federal employment laws.

Earlier this week I had occasion to hear from one of the senior management officers in the House talk about the CAA as we now approach the effective date for the—some of those laws, and I find it very refreshing to have one person—he didn't do it in one breath—but only one person who was required to explain in some detail the requirements of statutes as diverse as the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Warren Act, and a variety of statutes that really span the entire horizon of employment law regulation that is so different from my experience in the executive branch over the 10 years I served, early on as deputy counsel at OPM and later on as chairman of the MSPB.

You have heard already about how complicated this system is. I think it is important to keep in mind as we look at the charts around the room that these are charts that are designed for the benefit, at least based on my MSPB experience, on an employee at the no more than GS–7 level typically. I would say that is probably the average grade level of the MSPB level appellant.

I think it would be one thing to require a public law scheme as complicated as this if you are dealing with areas that really require this kind of complication. In fact, the only field of law that comes to mind while I look at these graphs in terms of parallel would be the Tax Code and tax law.

But in those cases, typically if someone has to deal with graphs and charts as complicated as these, they are also going to have the resources to be able to afford the kind of counsel that will help them work through this kind of labyrinth.

Again, it is important to keep in mind this whole system—I should say array of systems, is designed for people who typically are not in the upper brackets in our country and certainly don't have the resources to be able to afford counsel for any length of time to handle this kind of complication.

Reference was also made at the beginning of the morning about the cycle. I believe the ranking member, Mr. Moran, had noted his

concern that we not go through what he viewed as a cycle of centralization and decentralization. I would submit that we are—we have not seen that in the employment law field either during the last few years or even taking a more long-range historical approach.

Since the very early years of this century, there has been a steady accretion of workplace regulation by the Federal Government. Early on, through child labor law, the LaFollette Act in the Federal sector, through the 1930's with the FSLA and the Wagner Act, but beginning in the early sixties, there was a tremendous explosion, truly an explosive growth in Federal statutory regulation of the workplace, both in the private as well as in the public sector.

I do believe that the choices that were made in the late 1970's with the Civil Service Reform Act were reasonable choices when they were made, because the Civil Rights Act was still fairly fresh, especially in terms of its application to Federal workers; the whistleblower law concepts were still relatively new; the labor management relations program was undergoing significant structural change. There was sense to the laying out of these discrete fields in the way it was done in the CSRA.

But after, now, more than a decade and a half of experience with that scheme, it is clear, and I believe it is clear both to those who work within the system and would be patently clear to those who just view it from the outside, it is far too complicated and real obtuse for real people in real workplaces to have to deal with.

I would strongly encourage you and your colleagues to use the CAA as the beginning of a road map to see whether integration of these diverse programs cannot be developed quickly, at least somewhat along the lines of what Congress has provided for itself, with a view toward giving the benefit to executive branch managers and employees of an integrated workplace due process scheme and eventually recommending to colleagues in the labor committee that that also be looked at in the private sector as well, since the GAO study recently issued demonstrating that private sector employers of significant size are subject to as many as 26 different statutory schemes in the Federal Government as well as an Executive order.

All of those different schemes, so many of them regulated, administered by different agencies create enormous transactional costs for America, they create enormous transactional costs that consumers have to suffer in the private sector. They exact enormous transactional costs that our taxpayers eventually must suffer with an overelaborate Federal regulatory scheme. Reform is overdue, and with the CAA having been passed providing a useful road map, I would strongly recommend that that be taken as a first important step toward rationalizing the executive branch operations.

Thank you.

[The prepared statement of Mr. Levinson follows:]

Statement of

Daniel R. Levinson,

former Chairman, Merit Systems Protection Board

Before the

Subcommittee on Civil Service of the

Committee on Government Reform and Oversight

U. S. House of Representatives

November 29, 1995

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I am pleased to appear before you today to discuss streamlining the federal appeals process. I believe that the current process for assuring Executive Branch employees workplace due process is seriously flawed and in urgent need of reform.

My concerns about the current federal personnel appeals process stem from my experiences as deputy general counsel of the Office of Personnel Management, as Chairman of the Merit Systems Protection Board, and as a private practitioner. Over more than a decade of direct involvement with the process from these different perspectives, I feel strongly that the complexity of the current system undermines the ability of employees to pursue and win vindication of meritorious claims, perplexes and unduly burdens managers and supervisors who must respond to multiple and complex claims, and constitutes an indefensible burden on the nation's taxpayers who are ultimately charged with financing these complicated and costly dispute resolution schemes.

The fundamental flaw in the current process is the multiple and overlapping forums that are available for the redress of employee grievances in the Executive Branch. At the risk of thoroughly confusing the uninitiated, let me very briefly list where due process is obtained:

1. Nearly every agency provides an internal administrative grievance system and Equal Employment Opportunity (EEO) investigations capability;

2. The Office of Personnel Management (OPM) resolves classification (grade level) disputes, retirement claims, and controversies about overtime entitlement under the Fair

Labor Standards Act, agency debt collection disputes, and protests by veterans concerning appointments through the hiring process;

3. The Federal Labor Relations Authority adjudicates unfair labor practices, negotiability disputes, and resolution of exceptions to arbitration awards;

4. The Federal Service Impasses Panel helps to resolve collective bargaining impasses;

5. Labor arbitrators resolve workplace disputes pursuant to collective bargaining agreements, with appeals available to administrative agencies and to courts of law;

6. The Equal Employment Opportunity Commission provides hearings and an appellate process for discrimination complainants;

7. The Office of Special Counsel investigates and prosecutes allegations of prohibited personnel practices (like whistleblowing) and Hatch Act violations;

8. The Merit Systems Protection Board hears and decides appeals of demotions, long-term suspensions, and terminations from the service, as well as retirement-related cases;

9. The Comptroller General determines monetary claims relating to leave and salary;

10. The Department of Labor oversees the federal workers compensation system and monitors occupational safety and health disputes;

11. A "Special Panel" resolves adjudicatory disputes on civil rights issues between the Merit Systems Protection Board and the Equal Employment Opportunity Commission; and

12. On judicial review, over 900 federal court judges, sitting either individually or in panels, will have occasion to review one or more administrative rulings from one or more of

the administrative adjudicators and tribunals previously listed.

Were the election of remedies in civil service, civil rights, and labor management relations disputes a straightforward matter, this list of forums standing alone would beg for simplification. But the situation is actually far more complicated than even this intimidating list suggests. Disputes can arise over the various election of remedies themselves, thus triggering parallel litigation that can and does result in inconsistent rulings.

I am a strong proponent of workplace due process for employees of our federal government. I believe that such process can be accomplished far better, and far more efficiently, if one agency is charged with that mission. One agency, with the consolidated mission of providing a forum for the resolution of merit systems, civil rights, and labor management relations disputes, would reduce the costly overspecialization that has hampered the federal personnel field for so many years, and compel a worthwhile balance and integration of the independent goals of these programs.

At the judicial level, it would be advisable to consolidate the review of administrative decisions in one tribunal. Under Article One of the Constitution, the Congress has created specialized courts to resolve tax issues (the U. S. Tax Court) and government-related claims (the U. S. Court of Federal Claims). It could do the same in the federal personnel area, thereby relieving other federal judges of resolving these kinds of cases.

Just this year, the Congress has created a relatively comprehensive and integrated program for assuring workplace due process in the Legislative Branch through the newly established Office of Compliance. Such an integrated approach would benefit the Executive Branch and I would urge that the Congress move forward to achieve such a reform expeditiously.

Thank you for this opportunity to testify on such an important issue to our Federal government and I would be pleased to respond to any questions you may have.

Mr. MICA. Thank you for your testimony.

We will turn to Mr. Fischer now, who is the former general counsel of the Merit Systems Protection Board.

Mr. FISCHER. Thank you, Mr. Chairman.

I would like to have my written remarks submitted for the record.

Mr. MICA. Without objection, so ordered.

Mr. FISCHER. With that, I will abbreviate greatly what I said to you in my written statement. I do appreciate the opportunity to appear before you on this important issue of streamlining the Federal appeals process.

Up until July of this year, I was the general counsel at the Merit Systems Protection Board, and I served in that capacity for 9 years. Before that, I was an associate general counsel at the Office of Personnel Management, and before that I began my career with the Civil Service Commission as an investigator in 1966.

I worked in field offices on the west coast as an investigator and staffing specialist for the Commission, and then I came to Washington in 1973 as an attorney for the Civil Service Commission, and my entire career was spent with either the Civil Service Commission or successors of the MSPB and OPM.

The most dramatic thing that happened during my 29 years of civilian service was the Civil Service Reform Act, and this was a revolutionary type of change because the Civil Service Commission before that had been the single authority for personnel matters, both management policy and employee protection processes, in the executive branch.

In the 1970's, this was perceived as being seriously defective, because it was felt that one agency couldn't serve as the management arm of the executive branch and still appropriately protect and vigilantly protect employee rights.

So in its place, in 1978 Congress created what eventually became five different agencies: MSPB, FLRA, EEOC, and the Office of Special Counsel. Although the Special Counsel for a few years was part of the MSPB and, like the FLRA general counsel, prosecuted complaints before the MSPB, there was a dispute that arose about budget resources, and the Special Counsel was split off and made a separate agency.

There certainly is—and I echo the witnesses that have told you this—there certainly is a complicated, arcane sort of structure at work here, and with five separate agencies administering these different processes, what this creates, it creates problems both for the employees who are seeking a remedy and don't know whether to go to the OPM, MSPB, FLRA, EEOC, or Special Counsel, but it also creates all sorts of confusion for managers and supervisors.

They get into difficulties because they are no longer just responsible to their agency for what they do, all these outside agencies now have an effect and a voice in the discipline they take or the action that they take against poor performers.

In light of the difficulties that they face with these processes, it is not really that surprising that supervisors and managers are often reluctant to take action against problem employees or poor performers, and in this era of customer-friendly services it seems

archaic to have these five agencies administering these complicated systems that are so difficult to understand.

The other problem is, when these processes overlap and we heard testimony and Mr. Chairman, you mentioned the Lynch case as an example of what happens when these processes overlap and you get bounced back and forth between the MSPB and the EEOC.

There is also the potential—and Chair Segal spoke to this—about cases going back and forth between the FLRA, the MSPB, and the EEOC. Almost everyone agrees that this hasn't been a problem recently. That does raise the question, and I agree, it was my experience that there were not that many cases, but why keep that structure if it is no longer needed?

It is clear, also, that having these five separate agencies increases administrative costs, and in the area of personnel, budget, procurement, public information, congressional liaison, these are areas that were specifically targeted by the National Performance Review for reduction, and a reduction could be made if these were under the umbrella of one agency.

So I am in favor of the creation of one agency. It could be done incrementally. Initially the agencies could be placed under the single leadership of a board or commission. They could parade within their other sphere until they become comfortable and expert in the processes. This worked. It worked under the Civil Service Commission, and I think it would work under a new consolidated agency.

The present processes of the MSPB, EEOC, FLRA, and Special Counsel would be put into one agency. The OPM's classifications appeals process, which is an anomaly since they are principally responsible for management, would also go to this new agency.

I think that initially as an additional transition matter a task force could be established with the agency heads of staff to do studies and help provide input for the subcommittee on what measures should be taken and provide recommendations. I think it will work.

And, Mr. Chairman, I do appreciate the opportunity to appear before you. I would be pleased to answer any questions concerning my remarks.

[The prepared statement of Mr. Fischer follows:]

TESTIMONY OF
LLEWELLYN M. FISCHER
BEFORE THE CIVIL SERVICE SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT
UNITED STATES HOUSE OF REPRESENTATIVES
NOVEMBER 29, 1995

Chairman Mica, Ranking Member Moran, and members of the Subcommittee; I am pleased to appear before you today. Until July of this year, I was General Counsel of the U.S. Merit Systems Protection Board (MSPB). I served in that capacity for nine years. Before that, I was an Associate General Counsel at the U.S. Office of Personnel Management (OPM) and an attorney with its predecessor, the U.S. Civil Service Commission. In fact, I began my government career in 1966 as an Investigator with the U.S. Civil Service Commission and spent my entire career with that agency and its successors, MSPB and OPM.

I hope my perspective on streamlining Federal employee dispute resolution processes will assist you in deciding if reform is necessary and, if so, how it should be accomplished.

Before the Civil Service Reform Act of 1978 (CSRA), employee dispute resolution processes were administered by one agency, the U.S. Civil Service Commission. Since then, that authority has been divided among five separate agencies. OPM processes complaints from employees about how their job duties are classified. MSPB hears employee appeals from certain types of personnel actions and complaints involving prohibited political activity and reprisals against whistleblowers brought by a separate agency, the Office of Special Counsel (OSC). The Equal Employment Opportunity Commission (EEOC) has jurisdiction over employee discrimination complaints and related matters. The Federal Labor Relations Authority (FLRA) resolves labor-management controversies in the Federal sector.

The CSRA was intended to correct what was then perceived to be serious defects in the civil service system created by the Pendleton Act of 1883. Over the years, the Civil Service Commission had taken on both management and employee protection responsibilities. It was thus viewed in

the conflicting posture of serving "simultaneously both as the protector of employee rights and as the promoter of efficient personnel management policy."[1]

To correct this problem, Congress abolished the Civil Service Commission and, in its place, established OPM as the management and policy arm for personnel administration. The employee protection and enforcement responsibilities formerly administered by the CSC were transferred to the EEOC and two newly-created independent agencies, the MSPB and the FLRA. Both the FLRA and MSPB were modeled after the organizational structure of the National Labor Relations Board. Each was given an independent counsel to prosecute complaints that would be heard and decided by a collegial body composed of Presidential appointees confirmed by the Senate. The MSPB was further fragmented when disputes between the Board and its prosecutor about budget and resources led to the creation of a separate independent agency, the Office of Special Counsel.

The fragmentation of these responsibilities into five separate agencies has created confusion for employees and managers, bureaucratic overlap, and unnecessary administrative costs. Much of the confusion and inefficiency results from employees and managers having to respond to too many different agencies doing related work. Under the current structure, employees who want to appeal the way their job is classified must go to OPM. If they want to appeal certain other types of personnel actions, they must go to the MSPB. If they are covered by a collective bargaining agreement, the action may be subject to FLRA procedures. For complaints of prohibited discrimination, employees must look to the procedures administered by the EEOC. Finally, employees who seek relief from reprisal for whistleblowing are typically routed to the Office of Special Counsel for a remedy.

Although the Office of Special Counsel prosecutes prohibited personnel practices complaints before the MSPB and, like the MSPB, is charged with protecting the merit system, it is an independent agency. Organizationally and functionally, there is no better reason for having the

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[1] President's Message to Congress on Civil Service Reform (March 2, 1978), reprinted in Legislative History of the Civil Service Reform Act of 1978, Committee Print No. 96-2, 96th Cong. 1st Sess. at 736.

Office of Special Counsel as a separate agency than there is for making the General Counsels of the NLRB and FLRA independent agencies. In each case, those offices prosecute complaints involving violations of law to the agencies they serve just as the Special Counsel does before the MSPB.

The confusion becomes even greater when the processes administered by these different agencies overlap. For example, under current law when the MSPB decides an appeal involving an issue of discrimination, the employee may bring the matter to the EEOC. If the EEOC disagrees with the MSPB, the matter is referred back to the latter agency for reconsideration. If the MSPB disagrees with the EEOC, the case is then referred to a "special panel" composed of a Presidentially-appointed Chairman and two members designated by the MSPB and EEOC. After all of that, any decision may still be reviewed in court.[2] On occasion, this process has resulted in years of delay in reaching a final decision in a controversy.

Under the grievance procedures administered by the FLRA, an aggrieved employee affected by a "prohibited personnel practice" which also falls under the coverage of the negotiated grievance procedure, may raise the matter either under a statutory procedure or the negotiated grievance procedure. The employee is deemed to have exercised that option by filing under one procedure or the other. However, selection of the negotiated procedure does not prevent an aggrieved employee from requesting MSPB review of a final decision involving a personnel action that could have been appealed to the Board. Nor does selection of the negotiated procedure prevent an aggrieved employee from requesting EEOC review of a final decision involving prohibited discrimination administered by the EEOC.[3]

Understandably, these statutory provisions are unfathomable to anyone who is not an expert in civil service law. Moreover, each agency--the OPM, MSPB, OSC, FLRA, and EEOC--has its own set of regulations and instructions concerning these dispute resolution processes with different time frames and different results depending on how an appeal is raised. Each agency becomes its own fiefdom with a tendency to isolate itself in its own program, policies and procedures. Despite the best efforts of agen

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2 5 U.S.C. 7702.

3 5 U.S.C. 7121(d).

leadership, it is not surprising that the current statutory scheme encourages balkanization of these processes and tends to produce overlap and inefficiency as well as confusion.

I should point out that it has been my experience that those who administer the laws in these agencies are conscientious and responsive. They do their best in this maelstrom to prevent disorder, duplication, and delay. However, given the complexity of the current system and its components, only a naive employee would proceed without the assistance of an attorney or other counsel. It is also not surprising that managers and supervisors spend much of their time away from their regular duties when they are required to defend themselves and agency actions in these processes. And, in this unfamiliar labyrinth, supervisors become increasingly reluctant to take action against poor performers and those who disrupt the workplace. The result is public cynicism about governmental efficiency and dissatisfaction by managers and employees about how the processes are administered. In an era of streamlining and promoting "customer friendly" access to government services, Federal employee dispute resolution processes seem archaically duplicative and needlessly complex.

As can be readily imagined, having five separate agencies responsible for these processes also increases administrative costs. Each agency has its own management structure, including separate personnel, budget, procurement, public information, congressional liaison and other administrative support offices. Many of these support services have been specifically targeted by the Administration's National Performance Review as areas for staff and budget reductions. On administrative costs alone, budget staff at one agency has informally estimated that consolidation of these processes under a single administrative umbrella could save as much as $13 million.

Putting these processes under the oversight of a single agency would not undermine the fundamental purpose of the Civil Service Reform Act of 1978. The CSRA resolved to separate management functions from those of enforcement, adjudication, and oversight in the civil service. OPM would continue to perform its management policy responsibilities for the Executive Branch separate and apart from processes involving employee remedies. However, the processing of classification appeals is inconsistent with that

role and would be transferred to a new agency with consolidated adjudication and enforcement authority.

The new, independent agency--which for convenience of reference might be known as the Federal Employee Relations Board (FERB)--would be composed of three members and a General Counsel appointed by the President with the advice and consent of the Senate. Its major responsibilities would include:

(1) MSPB's adjudicative functions, including those of deciding the appeals of Federal employees and its program to study and report on civil service and merit systems;

(2) EEOC's jurisdiction over discrimination laws covering Federal employees and its oversight responsibilities for Federal agency EEO programs;

(3) FLRA's authority over labor-management disputes in the Federal sector; the Federal Service Impasses Panel's authority over negotiation impasses as well as the Foreign Service Relations Board and the Foreign Service Impasse Disputes Panel's jurisdiction over the labor-management relations program for Foreign Service employees;

(4) OSC's authority to investigate and prosecute prohibited personnel practices, including reprisal for whistleblowing, prohibited political activities ("Hatch Act" violations) and violations of other civil service laws; and

(5) OPM's authority to decide position classification appeals.

Creation of an agency such as the FERB would resolve some of the fundamental problems that exist in the present system administered by five different agencies. One entity would be created that would be fully accountable whether a dispute is raised as an adverse action, an unfair labor practice, or prohibited discrimination. Building on the lessons learned from the CSRA, this structure retains the independence and separation of those acting as judge, prosecutor, or analyst from those creating and implementing management policies. Simplification and consolidation of the five programs will improve the effectiveness of the process, increase efficiency, and reduce budget expenditures.

The new FERB would be established as an independent agency, composed of three members and a General Counsel appointed by the President with the advice and consent of the Senate. To ease transition, all current members of the MSPB and FLRA would be "grandfathered" into the new agency as members to fill the remainder of their terms. Qualifications for members would be similar to those that currently apply to the MSPB and FLRA and a Chairman would be chosen from the members. The powers of the new multi-headed agency would generally follow those of the MSPB and the FLRA.

The functions of the current Special Counsel and the General Counsel of the FLRA would be consolidated as a new FERB General Counsel position, but the incumbents of the former offices would be allowed to fill out the remainder of their terms. The authority of the General Counsel would be modeled on that of the Office of Special Counsel and the FLRA General Counsel.

The FERB would continue to use existing headquarters and field office structures. The present offices of the MSPB and FLRA, currently in the same cities, could be consolidated along with the two regional offices of the OSC. The Federal functions now handled in 50 EEOC field offices would also be incorporated. Over time, as the processes become more uniform and integrated, the number of field and regional offices could be reduced.

The FERB would establish uniform procedures, including time limits, filing procedures, and other requirements for all cases. The General Counsel would be responsible for investigating and prosecuting cases within the new agency's jurisdiction. As the FLRA currently does, the new agency would delegate responsibility to the General Counsel to handle representation matters. The General Counsel would also provide advice on prohibited political activities and labor-relations issues.

A small corps of administrative law judges (ALJs) would be used to hear the most complex cases. The bulk of the workload would be handled by attorneys, paralegals, and employees trained in alternative dispute resolution. ALJs would issue final, rather than recommended decisions. Review of decisions by the three member Board would be narrow and only legally important cases would be considered. Decisions of the Board would be final

and not subject to court review except that complainants with discrimination claims could go to a U.S. district court for trial de novo in the same manner as under existing law.

The initial reorganization step in the consolidation process would be to put all the processes into a single agency under one administrative and policymaking umbrella. To prevent major staff dislocation and disruptions, the programs could continue to operate in their own sphere on a transitional basis using existing staff and procedures. Then, with cross-training of adjudicators and support staff, steps could be taken to consolidate the processes and make them more uniform. Eventually, uniform time limits and filing procedures could be established with a single ALJ or presiding official hearing and deciding MSPB-type appeals, discrimination complaints, or labor controversies. This is not an unprecedented or novel notion. Before the CSRA, appeals officers at the Civil Service Commission heard and decided matters involving discrimination complaints as well as personnel action appeals. Other civil service hearing officers, such as those of the Employment Relations Board of the State of Oregon, hear and decide both labor relations controversies and appeals from personnel actions. Having a single ALJ or hearing officer in an agency decide all employment-related controversies under simplified and more uniform procedures would be a workable and cost efficient way to streamline the current cumbersome and overlapping processes.

It bears emphasis that critical comments concerning the present system are not intended as criticism of the present leadership and staff of the agencies involved. Despite the fragmentation of authority over processes and the sometimes convoluted statutory structure, the heads of the agencies and their staff have been instrumental in making a complex system work as efficiently as possible. In the 1980's, the Chairman of the EEOC, Clarence Thomas (now Justice Thomas) convened inter-agency study groups to foster cooperation and understanding between the agencies responsible for federal employee dispute resolution. That effort led to an annual federal dispute resolution conference under the leadership of the EEOC which has assisted agency heads and their staff in determining how their particular policies interrelate with those of other agencies. And, in this context, agency heads and staff continue to participate in annual conferences to make their processes more understandable to each other.

With that background of dialogue as a starting point, a transition task force composed of agency heads and key staff of the affected agencies may serve as an effective vehicle for planning and implementing changes to the present structure . Convening such as task force might serve to avoid the implementation problems that were noted by the General Accounting Office in its study of the reorganizations that took place in the wake of the Civil Service Reform Act of 1978. And, based on my experience, I feel confident that the leadership and staff of the agencies affected will work constructively with the Committee in making appropriate changes to the federal dispute resolution structure to make it simpler, more uniform, and efficient.

Mr. Chairman, I thank you for the opportunity to appear before the Committee on this important civil service reform issue. I would be pleased to respond to any questions you might have concerning my remarks.

Mr. MICA. Thank you, and we will get back to questions.

At this time I recognize Jerry Shaw, general counsel of the Senior Executives Association.

Mr. SHAW. Mr. Chairman, thank you for the opportunity to be here.

The proposal that SEA is making today is one that had been unanimously adopted by its 15-member board of directors from 15 different agencies. The efficacy has been confirmed by our survey results and by our experiences.

In essence, we propose a single organization, but we do not propose that that organization be one which is an executive agency, or the normal executive agency. We propose an Article 1 court be established.

It would be similar to the Tax Court, which is an Article 1 court. It would have independent judges that were appointed. It would have small case procedures to get rid of the minor matters, and the chief judge has the authority to appoint individual trial judges at his discretion for as long as he determines it to be necessary.

It has a whole bunch of advantages, but the primary reason that we propose the court is because one of the biggest problems is the overlap between the EEO system and the other systems. The huge amount of cases that arise, that cause problems in the EEO overlap area, surprisingly enough, it is not race or sex discrimination that is the most frequently raised EEO defense, it is handicap discrimination. That has just grown like Topsy over the last couple of years. The points would be consolidated, and employees would be able to get their EEO as well as their other appeal rights dealt with in this counsel court.

In the absence of an independent court, employees are still going to be able to go to district—Federal district court after they have completed this court or completed the appeals process in the Government just by raising an EEO issue.

So you are not doing away with the finality by establishing an independent executive branch agency or an executive branch agency that handles all of them, because you will still have the multiplicity of district courts, multiplicity of forum shopping in appeals to the various Federal circuit courts of appeal.

Our proposal would involve that program by establishing this one court that only handles Federal employee appeals problems, that are made up of judges that are nominated by the President and confirmed by the Senate for fixed terms, whatever those terms might be. The Tax Court is 15 years; it could be less or more.

It has the flexibility to assign special trial judges to handle specific things, to get rid of others, but it gives finality to not only the adverse action, not only the Federal labor relations or labor relations problems, it gives finality also to the Federal employees' EEO problem.

And the appeal, the only appeal to the judicial system that would be available under our proposal, is to the Court of Federal Appeals, U.S. Court of Federal Appeals—excuse me, U.S. Federal Circuit Court of Appeals, which would have jurisdiction over all appeals from that court, which would allow the Federal circuit court to establish, along with our Article 1 court, a sustainable and a clear body of law that would control all these actions and would actually

reduce the number of actions, because you are only going to have one circuit court dealing with the problem.

That is our proposal. We commend it to you. We think it would work. We certainly join with both Mr. Levinson and Mr. Fischer in arguing that we only need one organization.

Interestingly enough, every single Federal district court judge today deals with a lot more statutes and a lot more laws in a lot more variety as individuals than are encompassed by these five separate agencies. It does not take five separate agencies to reach a judicial or quasi-judicial decision in these matters. There is expertise involved, but it is not that which is not discernible by others.

I would just like to make two points. One is, Chairman Casellas in his testimony talked about our proposal that affirmative defenses not be allowed in performance cases. He said that that would not be appropriate because there could be an arbitration of performance standards where only African Americans would be affected or only women or only whites or whatever. That is not our proposal.

Our proposal is that there be established an arm within the EEOC, or whatever Federal group there is, just like the Special Counsel, that would have the ability to intervene, and an employee who said, look, they are only getting rid of whites here or only getting rid of women here, would have an outlet and an ability for an organization to intervene and stop the action before it got anywhere. It worked with the Special Counsel on whistleblowers, and it would work here.

The three-tenths of 1 percent of the cases where discrimination is the affirmative defense is found in cases appealed to the Merit Systems Protection Board don't justify anything else. They don't justify the thousands of cases that go through the process.

One more point. Mr. Casellas mentioned that States also have EEO systems so the ratio of complaints filed by public sector versus private sector employees does not equate.

That is true, they do. Many of them cover a lot more areas than our EEO system does; for example, the District of Columbia. It is also a violation of law, District law, to discriminate on the basis of sexual orientation and other matters that are not concerned in our EEO system.

Even if that 100,000 additional cases handled at the State level was factored into this, it would still be—and the assumption is that they are all the same—it would still be more than 5 to 1 cases filed by Federal employee versus private sector employees, and that is enough. Even if it is not 10 to 1, if it is 5 to 1, that is enough.

We thank you for the opportunity to testify, and we would like our full statement included in the record.

Mr. MICA. Without objection, your full statement will be included in the record.

[The prepared statement of Mr. Shaw follows:]

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TESTIMONY OF

G. JERRY SHAW

GENERAL COUNSEL

TO THE SENIOR EXECUTIVES ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

U.S. HOUSE OF REPRESENTATIVES

ON

STREAMLINING THE FEDERAL EMPLOYEE APPEALS PROCESS

NOVEMBER 29, 1995

Thank you, Mr. Chairman and Members of the Subcommittee, for the opportunity to testify on this important issue. In SEA's testimony on October 26, 1995 before this Subcommittee (concerning federal employee performance and accountability), we reported to you the results of an informal survey by SEA of its career senior executive membership. Of those responding to the survey, 95% were line managers not directly involved in personnel or human resources management. Of those responding, 90% stated that agencies were inclined to settle employee complaints in order to avoid the time and expense involved in defending the agency. In the survey, 98% of the respondent senior executives said that the "system" should be changed so that poor performers could be dealt with more expeditiously.

SEA believes absolutely that federal employees must be provided with due process when any governmental action is being taken against them, including federal employee appeals of adverse actions or disciplinary actions, in both conduct and performance cases. However, the assurance of due process and the opportunity for independent review by an independent body can both be accommodated without the current multiplicity of systems.

One of the primary problems is that federal employees overuse the systems that they have. In 1994, SEA conducted its own comparative study of complaints and charges of discrimination in the private and public sectors. The results showed that, over the

ten year period 1982-1992, for every complaint filed per 1,000 employees in the private sector, seven complaints were filed per 1,000 employees in the federal sector. In addition, we found that, over the same ten year period, employees of the Equal Employment Opportunity Commission filed complaints at a rate four times higher than that of federal employees generally (over 28 per thousand employees in comparison to 7 on average) and over thirty times higher than employees in the private sector. We do not pretend to understand this phenomenon. We speculate that people who are more educated about the options that are available to them have a tendency to use them more often. Thus, federal employees are more conversant with the EEO system than private sector employees, and federal employees at the EEOC are more conversant than either federal employees generally or private sector employees.

Whatever the reason, the fact is that federal managers are having to deal with seven times the number of EEO complaints from federal employees as are private sector managers. And, given the current system, they obviously have to devote seven times more resources to dealing with these complaints than private sector management. This affects the efficiency and effectiveness of government agencies.

Late in 1994, SEA also examined the Merit Systems Protection Board's annual reports for the prior eight fiscal years, FY 87 through FY 94. Of the total initial appeals filed, discrimination

was alleged in 28% or more as an affirmative defense. However, the discrimination allegation was withdrawn by the complainant in over 60% of the cases on average. Of the total cases decided where discrimination was alleged as an affirmative defense (approximately 700 or more per year), discrimination was found in less than .03% on average during these years. This does not indicate that discrimination is raised on too many occasions as a defense, but it does indicate that it is only in a small minority of these cases that discrimination is ever proven. This establishes that federal employees who have been subjected to adverse actions during this period have not been subjected to those actions because of unlawful discrimination on the part of management. To the contrary, the percentage where discrimination is found is so small that no one can reasonably conclude that discrimination is a matter of concern in these cases.

Against this backdrop, we believe that the main problem with the federal employee appeal process is that there is a multiplicity of ways in which federal employees can appeal personnel actions. For example, in the MSPB cases cited above, where the decision has gone against the employee, that is not the end of the matter. An employee can appeal an Administrative Judge's decision to the full Merit Systems Protection Board comprised of three Presidential appointees. If he or she does not like that decision, they can refer it to the EEOC and have that agency review the MSPB decision if discrimination was raised as a defense. If the EEOC disagrees

with the MSPB, and they are unable to resolve their differences, then a Special Panel must be comprised made up of one representative from each of the two agencies, along with a Presidentially-appointed chairman. The Special Panel's decision can then be taken by the employee to federal district court, which can review the case on the record and can allow other evidence not included in the record to be considered. If the employee is dissatisfied with the decision of the District court, he or she can appeal to a Federal Circuit Court of Appeals and, ultimately, to the Supreme Court.

Meanwhile, if the employee is a member of a union or a union official, they may file an unfair labor practice charge with the Federal Labor Relations Authority (FLRA). The General Counsel of the Authority can prosecute unfair labor practice complaints on behalf of the employee to an Administrative Law Judge of the FLRA. The Administrative Law Judge's decision can be appealed to the full FLRA panel comprised of three Presidential appointees. That decision is then subject to review by the Federal Circuit Court of Appeals.

I could go on to discuss the individual EEO complaint process or the Office of Special Counsel process, which the employee could also use, but I will not, nor will I discuss the ability of a bargaining unit employee to take the matter to arbitration under a collective bargaining agreement. Suffice it to say that these

avenues are also available under certain circumstances and could also result in a federal court's reviewing decisions of these bodies. And thus, the process would start once again.

This plethora of processes are not necessary, and in today's climate, neither the Administration, Congress, federal unions or management and professional associations are alleging they are necessary.

We wish to emphasize however that even with consolidation, the standard of proof in performance cases must remain "substantial evidence," and in conduct cases "preponderance of evidence." And, we strongly believe that affirmative defenses should not be allowed in performance cases. (For further information, see our testimony of October 26, 1995 before this Subcommittee).

We have two alternative recommendations. The first is that there be established a United States Court of Federal Employment (USCFE) wherein all the appeal processes would be combined into one avenue of appeal. The Court would have the jurisdiction of the MSPB, the FLRA, the federal employee EEOC process, the arbitration process and all matters currently appealable to the Office of Personnel Management, such as classification appeals, etc. The Court's jurisdiction should also encompass the duties of the Office of Special Counsel and the General Counsel's Office of the FLRA. Employees would appeal an adverse action or take their complaints

to this Court, and they would be heard by fact-finding examiners whose findings and conclusions the Court could adopt. The Court would have an investigatory arm encompassing the duties of the Office of Special Counsel and the General Counsel of the FLRA, which would allow investigation of alleged whistleblower reprisal or unfair labor practices, as well as the development of information which the Court could utilize in its decisions. In all cases other than those involving employment discrimination, the decisions of the Court would be final, with no right of appeal. In all matters arising under the civil rights laws, however, further review in accordance with the federal appellate rules would lie in the U.S. Court of Appeals for the Federal Circuit, with final review available in appropriate circumstances before the U.S. Supreme Court.

Obviously, this Court would be different than the typical federal district court. It would be established by statute under Article 1 of the U.S. Constitution, rather than Article 3 as are U.S. Federal District Courts. We recommend it be patterned after the U.S. Tax Court (see 26 U.S.C. §7441 et seq.) which is composed of judges appointed for 15 year terms, all of whom have substantial experience and expertise in tax law. Similarly, we recommend the Court have Judges appointed for fixed terms and nominated by the President and confirmed by the Senate. The Court would utilize extensively Special Trial Judges (as does the U.S. Tax Court) appointed by the Chief Judge to assist in the resolution of

assigned matters. A separate division could be established to conduct trial proceedings, including the possibility of jury trials in appropriate cases under the various civil rights laws.

Many might question why a court is necessary. In our view, it is necessary for two reasons: 1) One of the most common defenses and allegations raised in appeals of personnel actions, as previously shown, is an allegation concerning violations of the civil rights laws. We do not believe that the civil rights community could (or should) agree to give up the right of any person, including a federal employee, to take his or her case to a court composed of independent judges nominated by the President for a fixed term and confirmed by the Senate. That being the case, we can only envision a system wherein finality of federal employees' appeals would be possible with only one appeal by establishing a specialized court made up of independent judges. It would negate the necessity of an employee having the right to appeal a final decision by an administrative agency to the various district courts on civil rights issues. Every employee would receive finality in their decision where they would receive one appeal, the opportunity to raise all their affirmative defenses (all of which were examined by the same court, in whatever manner) and one final decision. Decisions of the Court would only be appealable to the U.S. Court of Appeals for the Federal Circuit, as are MSPB decisions now. Granting exclusive jurisdiction in all federal employee appeals of decisions of the USCFE (including civil rights matters) to the

Federal Circuit would allow a universal body of precedent to be established which would govern the employee-employer relationship in the federal government. There would be no forum shopping and no conflicting precedents in EEO cases by the various circuit courts, and finality would be achieved once and for all.

Some might say that this system is too "legalistic." We think that an accurate count of the number of attorneys in the various federal agencies involved in employee-employer disputes would establish that the present system is "legalistic." And, because of the current system's complexity, it is often only "understood" in all of its nuances by attorneys. This streamlined system would not, in our view, increase the number of attorneys needed.

In the past there were two primary obstacles to overhauling the current procedures: 1) Federal employee unions/associations and 2) the civil rights community. At this point, however, the major federal employee unions and associations have concluded that the process needs to be fixed and the appeals system streamlined. While we do not know the attitude of the civil rights community toward streamlining, we believe that most would wish to retain the rights of access of all federal employees to an independent Court in EEO cases. The Court suggested would continue to provide this access and would serve as a solution to the current multiplicity of appeals processes.

As an alternative, if Congress decides that a court is not the answer and that the processes must stay within the administrative arena, then we would favor one independent agency structured along the same lines as the court which we have proposed. They would handle all employee personnel appeals, including EEO complaints, unfair labor practices, classification appeals etc., so that finality in the administrative area could be achieved. If such an agency is established, we believe that it should be headed by a three member board with final decision-making authority, made up of Presidential appointees nominated by the President and confirmed by the Senate. We believe there are public policy considerations which are inherent in many of the federal employee appeal cases, and those policy considerations can only be taken into account by final decision-makers appointed by the President and confirmed by the Senate.

We recommend that the Subcommittee staff consult with the Honorable Dan Levinson, Esq., formerly Chairman of the Merit Systems Protection Board, and now Chief of Staff to the Honorable Bob Barr, Congressman from Georgia. Mr. Levinson's experience as Chairman, and his insight in the federal employee appeals process, are valuable resources which we commend to the Subcommittee and its staff.

We commend the Subcommittee for holding hearings on this important subject. We believe there is a window of opportunity to

actually do something about the appeals processes now, because all seem to agree that it's broke and needs fixing.

I would be pleased to answer any questions the Subcommittee might have.

COMPARATIVE STUDY OF COMPLAINTS AND CHARGES OF DISCRIMINATION

YEAR	NUMBER OF EMPLOYEES IN FEDERAL WORKFORCE*1	NUMBER OF EMPLOYEES IN PRIVATE SECTOR *2	NUMBER OF EMPLOYEES IN EEOC*3
1982	2,008,605	84,010,000	-
1983	-	85,297,000	3,055
1984	2,023,333	89,235,000	3,015
1985	-	91,119,000	2,975
1986	2,083,985	93,255,000	3,100
1987	-	95,640,000	3,100
1988	2,125,148	97,854,000	3,224
1989	-	99,873,000	2,942
1990	2,150,359	100,174,000	2,934
1991	-	98,976,000	2,934
1992	2,175,715	99,512,000	-

*1 U.S. Office of Personnel Management, Central Personnel Data File 1992, (compiled biannually).
*2 Current Population Survey, U.S. Department of Labor, Bureau of Labor Statistics, 1993.
*3 Federal Sector Report on EEO Complaints and Appeals - Fiscal years 1983 through 1991, Equal Employment Opportunity Commission (EEOC).

Attachment I

COMPARATIVE STUDY OF COMPLAINTS AND CHARGES OF DISCRIMINATION

YEAR	# of EEO Complaints Filed by Federal Government Employees*4	# of Complaints per Thousand Employees in Federal Government	# of EEO Charges Filed by Private Sector Employees*5	# of Complaints per Thousand Employees in Private Sector	# of EEO Complaints Filed by Employees of EEOC*6	# of Complaints per Thousand Employees in EEOC
1982	13,861	-	-	-	-	-
1983	16,770	6.9	70,252	.82	105	34.4
1984	17,916	-	71,197	.80	114	37.8
1985	19,386	8.8	-	-	104	34.9
1986	18,167	-	65,666	.70	60	19.4
1987	15,931	8.7	62,074	.65	71	22.9
1988	15,972	-	58,853	.60	106	32.9
1989	16,174	7.5	59,411	.59	73	24.8
1990	17,107	-	62,135	.62	79	27.0
1991	17,696	7.9	64,342	.65	93	31.7
1992	-	-	70,399	-	-	-

*4 and * 6 Federal Sector Report on EEO Complaints and Appeals, Fiscal years 1983 through 1991, Equal Employment Opportunity Commission.

*5 Annual Report, Equal Employment Opportunity Commission, Fiscal years 1983 through 1990 and EEOC "News" 2/26/91, 12/1/92 and 8/10/93.

COMPARATIVE STUDY OF COMPLAINTS AND CHARGES OF DISCRIMINATION

YEAR	# of Findings of Discrimination Made in Federal Government Sector*7	Percentile of Discrimination Cases Sustained in Federal Government Sector*8	# of Findings of Discrimination Made in Private Sector*9	Percentile of Discrimination Cases Sustained in Private Sector*10	# of Findings of Discrimination Made in EEOC	Percentile of Discrimination Cases Sustained in EEOC
1982	338	2.4 /hundred	1,970	-	-	-
1983	363	2.2 /hundred	2,162	3.1 /hundred	2	1.9 /hundred
1984	348	1.9 /hundred	2,531	3.6 /hundred	2	1.8 /hundred
1985	235	1.2 /hundred	1,953	-	4	3.8 /hundred
1986	246	1.4 /hundred	1,863	2.8 /hundred	0	0
1987	244	1.5 /hundred	1,412	2.3 /hundred	4	5.6 /hundred
1988	323	2.0 /hundred	1,938	1.6 /hundred	1	1 /hundred
1989	412	2.5 /hundred	1,941	3.3 /hundred	0	0
1990	250	1.5 /hundred	2,973	4.8 /hundred	0	0
1991	244	1.4 /hundred	1,735	2.7 /hundred	0	0
1992	-	-	1,606	2.3 /hundred	-	-

*7 Report on Pre-Complaint Counseling & Complaint Processing by Federal Agencies, EEOC, 1982-1992, "Complaint Inventory Summary". The figures represent federal agencies actions on recommended decisions received from the EEOC.

*8, *10 This study demonstrates that substantially more discrimination complaints are filed per thousand workers in the federal government workforce than in the private sector, however, a smaller percentile of discrimination cases are found valid in the federal workforce than in the private sector.

*9 "Enforcement Statistics" FY 1982 through FY 1992, EEOC Office of Federal Program Operations.

COMPARATIVE STUDY OF COMPLAINTS AND CHARGES OF DISCRIMINATION

YEAR	# of Women & Afro-Americans in the Federal Government Work Force*11	% of Total Federal Government Work Force	# of Women & Afro-Americans in Private Sector Work Force*12	% of Total Private Sector Work Force	# of Women & Afro-Americans in EEOC*13	% of Total EEOC Work Force
1982	1,099,999	55%	42,374,000	50%	1,676	57%
1983	-	-	43,270,000	51%	1,681	58%
1984	1,126,970	56%	45,675,000	51%	1,613	58%
1985	-	-	47,161,000	52%	1,871	61%
1986	1,200,952	58%	48,515,000	52%	1,787	61%
1987	-	-	50,265,000	53%	1,721	62%
1988	1,247,151	59%	51,699,000	53%	1,972	64%
1989	-	-	52,952,000	52%	1,714	65%
1990	1,283,971	60%	52,271,000	52%	1,752	65%
1991	-	-	52,829,000	53%	-	-
1992	1,306,271	60%	53,213,000	53%	-	-

*11 U.S. Office of Personnel Management, Central Personnel Data File 1992, (compiled biannually).
*12 Current Population Survey, U.S. Department of Labor, (DoL) Bureau of Labor Statistics 1993. The DoL measures minorities as Afro-Americans, thus, figures taken from OPM and EEOC reflect statistics for women and Afro-Americans. Asian Americans and Hispanics are not included in the minority category for this study.
*13 "Federal Agency Trend Summary for Agencies With 500 or More Employees, 1982 Through 1990", Office of Communications and Legislative Affairs, EEOC.

FEDERAL EMPLOYEE APPEAL ROUTES

The following diagram charts available appeal routes for a career federal employee who is removed from Federal employment based on unacceptable performance. The example assumes that the employee can assert affirmative defenses of Whistleblower Reprisal, sex and age discrimination, and reprisal for engaging in union activities.

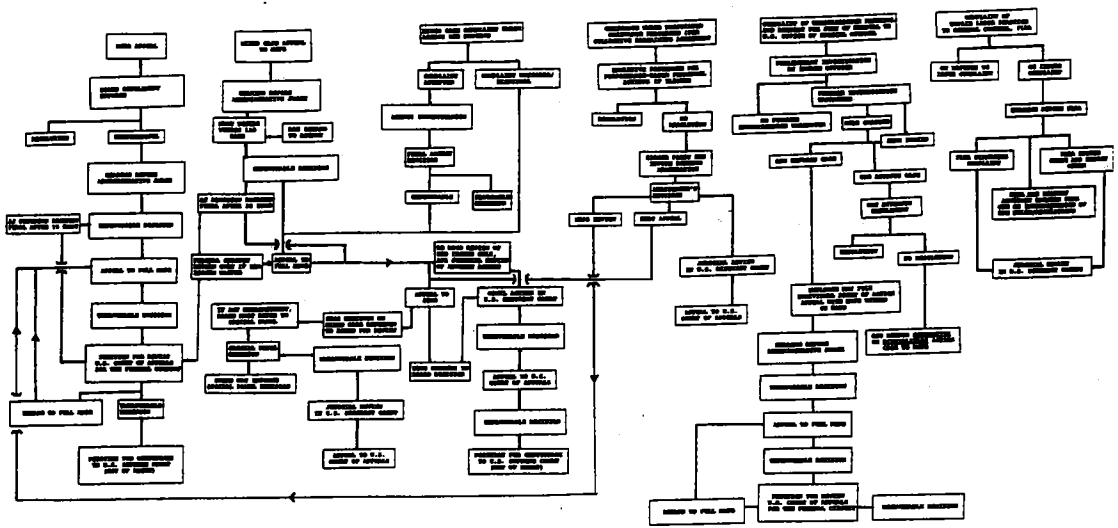

DIAGRAM PREPARED BY THE LAW FIRM OF
SHAW, BRANSFORD & O'ROURKE (1995).

CORRECTED COPY
FLRA has no review of adverse action cases

Attachment 2

Mr. MICA. We will now turn to Clinton Wolcott, assistant counsel of the National Treasury Employees Union.

Welcome.

Mr. WOLCOTT. I am here today on behalf of Robert Tobias, president of the National Treasury Employees Union, and I would ask that the Union's full testimony be placed in the record.

Mr. MICA. Without objection.

Mr. WOLCOTT. I will make brief comments.

We welcome this opportunity to discuss the complaint handling procedures that are now available in the Federal Government.

In listening to earlier witnesses and comments that came from the subcommittee, there was one theme that recurred over and over. It was that we should look to the private sector and we should use alternate dispute resolution procedures more effectively. NTEU fully concurs that this is the approach that should be taken in streamlining the Federal complaint handling system.

The current system does have important elements that are similar to those used in the private sector and that incorporate significant ADR procedures, and we think that those procedures should be expanded and used more.

Our experience is that the real success story of the current system has been in development of these less formal procedures. In particular, the most important of these is the use of mandatory grievance and arbitration procedures introduced in the Civil Service Reform Act and abbreviated negotiated grievance procedures that are now available for almost every dispute that arises in the workplace, and NTEU uses these procedures for almost every kind of employment dispute. The process is very efficient, very fair.

We have also adapted new types of consensual dispute resolution procedures to other contexts where the statutory procedures do not work effectively. For example, we use hybrid mediation arbitration procedures in contract negotiations. This avoids using the Federal Service Impasses Panel procedures and other types of administrative procedures that can be cumbersome. The parties agree on the procedure to resolve the contract disputes, and it works quite well.

We have also been very active in developing quality of workplace programs and partnership programs with agencies. These forums are available for the discussion of the issues before they become disputes, and they are very—also very effective in reducing the number of workplace disputes.

We think that any effort to streamline Federal complaint processing should begin with these types of procedures, and we think that these procedures can become the exclusive procedures for many of the complaints of Federal employees. We would propose that that jurisdiction of the MSPB over bargaining unit employees is no longer necessary, that the complaints that are currently handled by MSPB can be handled through grievance and arbitration without any problem and that that would be a streamlining process that would be very cost effective and advantageous to all the parties.

Two other issues that I would like to address that have come up today: First, there is a significant problem in handling of discrimination complaints through the current internal agency complaint procedures. These procedures lead to enormous delays, and I know

that there seems to be a sense that the delay is caused by employees who are using the system at great length, but I think that the cause of the delay and problems is in the cumbersome internal agency procedures that revisits the same issue over and over again and that allows for the decisionmaking to be entirely internal to the agency for the entire administrative process, which leads to no quick resolution of those.

There is legislation currently pending, the Federal Employee Fairness Act, H.R. 2133, that would address a lot of the concerns about the EEO process that were raised today, Congressman Moran's questions about triage. The Federal Employee Fairness Act does have a procedure for getting rid of frivolous cases early, and I think that that is a forum that the civil rights and employee groups have been happy to endorse.

It also—the procedure would also cut down on the enormous levels of review within the agency that are taking place now and have a simple administrative hearing that would be quick.

The second issue is, I think that the jurisdiction of the Federal Labor Relations Authority is overly complicated and should be simplified. Within the Federal Labor Relations Authority there are a variety of different kinds of procedures; negotiation procedures, impasses procedures. Many of these procedures could be simplified and eliminated, and we have made some specific recommendations to that effect in our written testimony.

In conclusion, I want to stress that the NTEU is eager to work with the subcommittee to formulate modifications to the current system that will increase Government efficiency and enhance dispute resolution. We are happy to consider any recommendations for less formal procedural structures as long as the new forums provide an effective role for employees and assure their interests will be protected.

[The prepared statement of NTEU follows:]

TESTIMONY OF
ROBERT M. TOBIAS
NATIONAL PRESIDENT

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

ON

STREAMLINING THE APPEALS PROCESS

NOVEMBER 29, 1995

U.S. HOUSE OF REPRESENTATIVES

901 E Street, N.W. • Suite 600 • Washington, D.C. 20004-2037 • (202) 783-4444

Mr. Chairman and Members of this Subcommittee, my name is Robert Tobias and I am the president of the National Treasury Employees Union. NTEU is the exclusive representative for fourteen different federal agencies throughout the federal government. NTEU has been in the forefront of the trend to apply innovative dispute resolution techniques to the federal workplace and we welcome this opportunity to discuss the complaint handling procedures that are now available in the federal government.

There are several different administrative entities that adjudicate disputes involving federal employment - most notably the Federal Labor Relations Authority (FLRA), the Merit Systems Protection Board (MSPB), and the Equal Employment Opportunity Commissions (EEOC). In addition, many broad issues and specific disputes are resolved through the collective bargaining process, through negotiated grievance procedures, and through Partnership Counsels created under the Executive Order.

This constellation of administrative and negotiated procedures arose from the Civil Service Reform Act of 1978. The structure reflects a congressional impulse to insure that certain employee rights and certain management prerogatives be protected. In some instances, Congress created procedures largely to address specific employment problems; MSPB's Office of Special Counsel, for example, is charged with the protection of whistleblowers. In other instances, Congress attempted to develop procedural devices that would be a substitute for traditional economic

weapons, such as the strike, that it was not willing to provide federal employees. The negotiability and Federal Services Impasses Panel procedures at the FLRA are examples of such procedural devices.

There is some overlap in this system, such as possible consideration of certain personnel actions by both the EEOC and the MSPB. This overlap does not stem from a love of redundancy, however. It reflects a deeply held and historically rooted concern, which continues to this day, that certain principles, such as the requirement that the workplace be free of discrimination, have not been adequately protected by decision makers primarily focused on the civil service statutes.

As we approach the 20th anniversary of the CSRA system, however, it is appropriate to take a look at what has worked and what has not worked, and to develop modifications to make the system simpler and better. First, I would like to turn to some of the successes of the CSRA, because they point the way for modifications that will improve the system.

The CSRA introduced mandatory, binding arbitration of employment and contract disputes in the federal sector. There can be no doubt that the innovative use of party-controlled dispute resolution procedures provides a vast improvement over cumbersome and often ineffective administrative procedures for employees covered by collective bargaining agreements. Under the CSRA, the negotiated grievance procedure is available for almost every dispute and NTEU is generally inclined to use the

negotiated grievance procedure to resolve the entire range of employment issues, from an individual challenge to a performance appraisal to a dispute over an agency-wide policy. The process is efficient and it is fair.

NTEU has also adapted consensual dispute resolution procedures to other contexts where the statutory procedures do not work effectively. For example, we have agreed with several agencies that we will utilize hybrid mediation-arbitration procedures in contract negotiations. These private procedures help us to avoid the cumbersome and time-consuming procedures of the Federal Services Impasses Panel and the FLRA's negotiability process.

NTEU has also been in the forefront of developing quality of worklife and Partnership programs with agencies. These programs bring dispute resolution full circle. In these forums, important issues are addressed, the parties' interests are served, and decisions are often made before the issues even become disputes. That is true efficiency.

The key to all these successes is that the parties are engaged to resolve their own disputes to the greatest extent possible. The focus is on finding an appropriate resolution to the problem at hand, not on legalistic rights and abstract standards.

Now, let me turn to some of the problems with the CSRA dispute resolution process. The most obvious problem is that some of the innovative, "expedited" procedures developed under

the CSRA have not worked as intended. Most notably, the procedure for resolving disputes over "negotiability" of contract proposals is a disaster -- it fosters delaying tactics and promotes just the kind of legalistic hair-splitting that distracts from real problem-solving.

In addition, the CSRA fragments authority in the FLRA between the unfair labor practice, negotiability, and FSIP procedures. This has resulted in many situations where it is simply not possible to make a decision of one part of the FLRA stick. A recalcitrant agency may drag a dispute through the negotiability process, the FSIP, the grievance procedure, the unfair labor practice procedure, and federal court, exhausting employees and sapping their resources long before the administrative processes are complete.

For EEO complaints, the statute provides internal agency complaint procedures that have become mere delay factories, rather than dispute resolution procedures. EEOC, which would do a better job of protecting employees from discrimination than the employing agencies do, is hamstrung by a lack of resources and authority. For other individual employee complaints, the Office of the Special Counsel and the MSPB have proved to be insufficiently protective of employee rights.

In sum, the less formal, party-controlled and developed dispute resolution procedures have been very effective, while the formal administrative procedures have been more likely to bog down. The discussion over the direction of reforms to the

current system should therefore focus on these successful approaches. The trend toward less formal procedures, more oriented to problem solving, dovetails with the current trend to more flexibility and decentralization in governmental operations generally.

If the kinds of procedures that NTEU has utilized effectively are to become widespread and to serve as the sole procedure available for certain kinds of problems, then there must also be a mechanism to make sure that the procedures are adequately funded. While the details of this process are a matter that is best left up to the parties, the current prohibition of mandatory representation fees must be eliminated.

I have several concrete proposals that would simplify the process in the manner I suggest.

- The current restrictions on the resolution of negotiability issues should be eliminated so that mediators and arbitrators who are resolving bargaining impasses can also determine the negotiability of specific proposals. Under current law, negotiations may stop when one party asserts that a proposal is not negotiable, and the issue is resolved through the FLRA's negotiability procedure. Further, the enforcement of arbitration decisions should take place in district court with the same limited review that is now afforded in the private sector.

- The MSPB's jurisdiction should be markedly reduced. MSPB should only be available for employees who are not included in collective bargaining units. Negotiated grievance procedures

provide for more effective resolution of employee-employer disputes, and they should be utilized.

- The authority for the EEO administrative process should be modified as is proposed in the Federal Employee Fairness Act, H.R 2133. This Act would greatly streamline the federal sector EEO process, eliminate the fundamental conflicts of interest that currently exist within the process, provide strong incentives to eliminate discrimination, and discourage employees from filing meritless EEO charges. It provides for mandatory conciliation, the early dismissal of meritless claims, and the resolution without a hearing of cases that do not present factual issues. The Act also streamlines the administrative process and eliminates the cumbersome mixed-case procedure for combined MSPB-EEOC jurisdiction.

In conclusion, I want to stress that NTEU is eager to work with the Subcommittee to formulate modifications to the current system that will increase government efficiency and enhance dispute resolution. We are happy to consider suggestions for a less formal procedural structure, as long as these new forms provide an effective role for employees and insure that their interests will be protected.

Mr. MICA. We thank you, Mr. Wolcott, for your testimony, and the other panelists.

I have a couple of questions about the proposal to create a single agency, and I guess Mr. Levinson, Mr. Fischer, and Mr. Shaw propose a single agency.

Do you believe that there is a danger that a single agency would be so swamped with appeals that it would no longer be able to take all of the appeals and handle them in an expeditious manner?

Also, Mr. Moran had mentioned that we may be going through cycles here and creating—bringing things back together that were functioning independently very well and just be going through a cyclical phase here. What is your opinion of this, Mr. Levinson? Mr. Fischer.

Mr. LEVINSON. Mr. Chairman, on the first point, I think it is very important that we not be intimidated by sheer numbers. The numbers themselves can tell different stories based on who is interpreting them, as we have seen already this morning, and any successful effort to reform the system is going to have to encompass a mandate that there be some procedural reform to the way cases, disputes, complaints, charges, if you will, are defined and how they are processed at the immediate intake stage.

It is very possible, based on the numbers that we have seen from these various agencies over the last few years, we could be looking at an enormous case intake number.

On the other hand, does that perhaps tell us that, based especially on the number of dismissals for nonmeritorious causes or for procedural problems—I remember at the MSPB, for example, hundreds and hundreds of cases a year are filed with the board by employees and former employees who don't have appeal rights. That winds up being a part of the case processing numbers.

But the system is so obscure that many Federal employees don't understand the rights that they enjoy now, and what this does is, it triggers a certain percentage of case filings and complaints and charges by people who, in fact, don't have a dispute that can be heard under the current system.

So these numbers by themselves really don't tell us any story, and it is important to look at the system structurally as a whole and not be driven by any particular part of it.

On the cyclical question, as I made reference to in my statement before, I don't believe that one could honestly chart a cycle to what we have seen over the last 20 years. There were very specific reasons why CSRA wound up the way it did.

There was concern that the Civil Service Commission had not been able to apply civil rights law properly. At that time, the law itself as it applied to Federal employees was only a few years old. The labor management relations statute, it had been cited, needed a separate statutory foundation.

That is not so much a cycle of centralizing and decentralizing but of workplace due process being enhanced over the last couple of decades to a point where we now, as we approach the millennium, have a renewed or a different sense of what due process in the workplace is all about.

At this point, to make it work effectively, we need a more holistic, integrated approach to the concept itself. That can only be done

by thinking more along the lines of a synthesis, as opposed to the analysis that went on in the 1970's, to try to parse these separate statutory schemes.

Mr. MICA. Mr. Fischer.

Mr. FISCHER. Yes, I agree with Mr. Levinson's comments, and I don't think that as far as the—being swamped, a single agency being swamped with all these appeals and not being able to handle it would necessarily be the case.

If you start out incrementally and put all these different programs under the leadership of one agency, you are still going to have initially, I think, the same resources that you had in separate agencies. The difference would be that, at least at the beginning, that they would continue to operate in their own programs and then gradually, with training, as the administrative judges or decisionmakers acquire the skills in these other program areas, then you could consolidate and cut back.

For one thing, all these agencies now have separate field offices. I think EEOC has 50 field offices. The FLRA has 11. The MSPB has 11. There could be a great saving in just consolidating field offices, putting them under one roof.

I don't think, as far as staff, you need to initially reduce the staff, and I don't see why the existing staff, if they are handling the appeals now, couldn't handle them in the future.

I also agree with Mr. Levinson's comment about this not really being a cyclical sort of thing. We have the one agency, the Civil Service Commission, administering all these processes, and there was a separate—contrary to the impression that may have been created by testimony this morning—there was a separate program for civil rights in the Federal sector. It was administered by the Civil Service Commission. I think the Civil Service Commission did a good job.

There are problems that are unique to discrimination in the Federal sector. We saw and heard testimony that 10 times as many complaints are filed in the Federal sector. Maybe that requires a separate Federal program; spin it off from the EEOC, and integrate it with the other processes; but I don't think the configuration, the consolidated agency configuration, has really been tried, integrating the present complicated processes.

So I don't think it is a cyclical kind of problem. We would be dealing with a new entity, and I think there are efficiencies to be had.

Mr. SHAW. I look forward to answering this one.

The first 760 employees—which all these Federal agencies have—doesn't strike me as a lot. I worked at IRS for 20 years, and we had 125,000. So 760 is not real difficult to manage.

Second, Mr. Chairman, I think more important than these individual agencies is what goes on in Federal Government agencies themselves. I would just give you an example, and I probably will get killed by somebody for this later.

I came to work for the Federal Government right out of law school—a little older than others, because I had been in the military for quite some time—in 1970 as a GS–11. At that time, there were three attorneys in the Office of Chief Counsel of the Internal Revenue Service, which has over a thousand attorneys that han-

dled Federal employee appeals cases and that handled most of these processes.

Now, President Nixon had just signed the Executive order giving the Federal Labor Relations—establishing the Federal Labor Relations Program, where there had not been one before.

In 1976, I was made a division director of 65 attorneys, and they were not all in Washington, DC, they were around the country, but we had 65 attorneys handling Federal employee appeals cases, handling labor arbitration cases, handling unfair labor practices, handling all the cases where before we had four.

I am not saying it is good, bad, or indifferent, but it gives you an idea of the magnitude of the effort and the dollars that agencies put into dealing with all these things.

Any consolidation in a single agency is going to reduce the necessity for these agencies, all the rest of the agencies, to have this multiplicity of individuals working in it. That was just the attorneys. That didn't count the EEO specialists, labor relations specialists. That didn't count all the rest of the people involved in the system and that remain involved in the system so far as I know.

I think it could have some real dollar impacts across the Government, not just in the agency that is adjudicating it, which, by the way, don't ever forget my proposal is a Title I, Article 1 court—can't let that one go.

Mr. MICA. Thank you.

Mr. Wolcott.

Mr. WOLCOTT. Mr. Chairman, I would like to say that NTEU does not think there would be an advantage to consolidating the different agencies, that the different expertise that they bring to bear to these issues is sufficiently distinct that there wouldn't be an advantage.

Simply moving the boxes around on the board isn't going to really save particular amounts of money or make things more efficient.

Certainly in the private sector all these different issues are handled by different entities, and I don't think there is any reason why it shouldn't be an advantage to do it differently in the Federal Government.

Mr. MICA. My first question dealt with structural change, and I think Mr. Shaw said we have to also look at the function.

One of the things that concerns me is, just looking at the statistics, and the 10 to 1 ratio, or 5 to 1 ratio, whatever it is, Mr. Levinson, Mr. Fischer, maybe Mr. Shaw, what can we do to decrease the number of cases here, appeals and complaints? Or is it just endemic to the Federal workplace that you have so many of these cases filed?

Mr. LEVINSON. It is possible that we have an overly formalistic system that has probably been encouraged by these different structures that we have put in place for every shape, manner, and form of complaint separated out in very discrete categories.

So I think one of the additional benefits of trying to bring a synthesis to this is to force people to think about whether there are peculiar aspects either to the Federal workplace or to the way it is managed that bring certain kinds of disputes to the workplace more often than we see in other sectors of the workplace.

I don't think this is going to be encouraged by these separate agencies, because at bottom these agencies had investments in the programs very much as they are structured, and any possibility of seeing a fresh perspective is going to be enhanced, I think, enormously by looking for more radical reform of the system itself.

Mr. MICA. Mr. Fischer.

Mr. FISCHER. I think that it would be very difficult to reduce the number of complaints that you have under all these systems, but there has been a lot of talk about trying to make the processes more efficient by using alternate dispute resolution procedures, and maybe that is the methodology for increasing the efficiency, in dealing with the problem that way.

The problem with that is that these processes tend to be lawyer driven. The lawyers draft the regulations. The lawyers administer the processes. They are taught in law school to resolve disputes in a certain formalistic way according to the court cases that they brief, and they extrapolate that to the systems that they administer, and they are resistant to innovative techniques simply because they have been schooled in something else.

And the courts perpetuate this, because they want to create administrative processes in their own image, and if the administrative process isn't consistent with what the court thinks is due process and an appropriate procedure, then they will reverse the agency, with the result that the processes become more and more judicialized, more and more formalized, and I think that is a real negative with alternate dispute resolution.

You would have to force the agencies, literally force them, to adopt more informal procedures. As long as you have got these agencies fragmented, they are going to be going in different directions. I think there should be some coordinated effort if you are looking for alternate dispute resolution.

Right now, the FLRA has one program, the EEOC has another, MSPB has another, consisting mostly of a settlement process. So I think it would be—it would be useful.

Mr. MICA. That is interesting. It was interesting to hear the MSPB Chair and the EEOC Chair both talking about resolving these problems in the workplace at the initial stages, and then you look at the statistics and—that appears to be the policy of the current administrators of these activities.

But then you look at the statistics, and you see that counseling and workplace, actually the numbers of cases being handled at that level has dropped, and the formal complaint process has actually increased even though their policy now is to encourage the informal resolution. So people are using this formal process even more.

I don't know if I buy the EEOC Chair's rationalization that we are doing away with the frivolous cases. God, if we are doing away with those and we still have formal ones at that magnitude being filed, we still have a gigantic problem.

What do we do?

Mr. SHAW. I would like to pick up on this point. In the D.C. court system which I will speak highly of here in a minute, in the civil side they have a mandatory mediation before you go to trial, they have instituted a couple years ago. It resulted in a 50 percent settlement rate.

I was involved in a case that I didn't think there was any way in God's green earth this would settle without trial, and it settled in that mediation in three-quarters of 1 day. The mediation there was done by attorneys and retired attorneys from government, et cetera, on a voluntary basis. They don't even pay them for it, but it works.

I think a mandatory mediation system that people have to go through before they go to trial is a very, very valuable tool to reduce actual trial cases.

Second, reducing the number of cases. One of the reasons I think that you are seeing an increase in the formal complaints is because the formal complaint is used as a shield. If an employee thinks anything adverse might happen to them, if they file an EEO complaint, and the manager does anything for in some cases years, then they file a reprisal complaint and say the reason you are doing this is not because I was originally—my original discrimination complaint or my original whistleblower complaint was valid, it was because you are taking a reprisal action against me for having filed that original complaint. So it becomes a very effective shield.

The Office of Special Counsel, God bless him, winds up most of the time prosecuting managers because of, quote-unquote, reprisal actions.

I have personally seen cases where the alleged reprisal action was a normal personnel action that took place 3 to 5 years—as long as 5 years. In this one case, 3 years, that was a reassignment as part of a reorganization.

It just boggles the mind that, if I can make an allegation that I can make myself a whistleblower, that therefore you can't touch me for the rest of my career, because if you do, the Special Counsel is going to get you. The same thing happens in the EEO process.

So the consolidation and the ability to deal with all these issues in one case, in one forum, with finality is going to reduce the number of cases, in my judgment.

Mr. MICA. Did you want to respond, Mr. Wolcott?

Mr. WOLCOTT. No.

Mr. MICA. Well, I have another question dealing with EEOC, and I address it to any of the panelists here.

It has been suggested that Congress give Federal employees the right to file discrimination complaints directly with EEOC under the same procedures available to the private sector individuals. What would you think of an approach like that?

Mr. Levinson.

Mr. LEVINSON. Well, I don't see it as necessarily helping the process along all that much by simply allowing, in effect, the private sector vehicle as opposed to the current system. It may be a marginal improvement, but I think nevertheless it is accompanied by a larger change within the executive branch. I would not view that as in any shape, manner, or form, a comprehensive fix.

Mr. SHAW. I am not sure that that would serve any purpose. I really believe that the Federal Government today is a much better integrated, much more upwardly mobile workplace for minorities, for women, for people with handicaps than the private sector, in part because we have a separate process that people can use to get redress, and they should.

Many people will say, gee, the more complaints you see filed in an agency, the more success you see in that agency of people moving up that are minorities, or women, or persons with handicaps.

I don't know that that is the case. I don't know that it is not the case. But I would be afraid to separate the system so much that the EEO process was all private sector and had nothing to do with the other personnel relations process and employee relations process in the Federal Government of whatever kind.

Mr. MICA. Mr. Wolcott, would you like to respond?

Mr. WOLCOTT. I would like to concur that I think that would be a bad move to adopt a private sector system. I think it would force way too many cases into court that are now settled through administrative processes, and it would mean that most of, or many important discrimination issues would just not get resolved at all. You need an internal administrative system.

Mr. MICA. I would like to ask a question about the consequences of the Government losing in some of these cases. The MSPB testified at our October 26 hearing that the Federal agencies' decisions are upheld in more than 80 percent of the cases brought before this agency.

Who bears the expense of the agencies when the agencies lose? Are, for example, officials found responsible for discriminatory conduct held personally accountable for their actions? Should they be? Who bears the expense of the agency's litigation efforts when these cases are pursued to the Federal or district court levels?

Mr. Levinson, are you familiar with this?

Mr. LEVINSON. Yes, although I know that Mr. Shaw will also want to speak to this at some length, because he, too, knows it well.

That 80 percent figure, let me first say, is consistent historically with the affirmance rates that the agency is given to adverse action appeals, the typical kind of termination or disciplinary case that comprises more than half of the Board's caseload. Agencies do get affirmed approximately 80 percent of the time. This has been true for many years.

Frankly, if it was much lower, it would suggest serious management problems if agencies can't take their adverse actions and be able to prevail most of the time they are challenged. That would raise a serious problem in terms of how that agency is managing its people.

With respect to those cases of losers, if the employee is brought back on the rolls, the agency that took the action would be bearing the expense of the case. Certainly attorneys' fees, as you may know, under the Civil Service Reform Act, are available in a substantial number of these cases, and those fees would be paid, I guess, out of the Justice Department fund.

Mr. FISCHER. Once it gets to court.

Mr. LEVINSON. And by the agency itself if it doesn't get to court.

Mr. FISCHER. Right.

Mr. MICA. Mr. Shaw, did you want to respond?

Mr. SHAW. Well, I don't really have much to add to what Mr. Levinson said.

The impact of lost cases on an agency, especially in a performance case, can be very, very devastating when that employee is put

back in the workplace. Again, especially if it is the result of an affirmative defense and the employee has, in fact, been proved to be less than a fully successful performer, we don't think that that should happen, because it does set a tenor in the agency that you can't get rid of people even if they are poor performers because they will book you with the other affirmative defenses that are available.

That is why we feel so strongly that that has to be separated so that performance is dealt with as performance, no matter what.

Again, if a pattern developed or even looked like a pattern of discrimination on a handicapped basis or whatever else was developing, I think the EEOC or some arm of this independent court should be in there in a real hurry to stop that.

Should managers be disciplined? In some cases agencies do discipline managers. In some cases I have heard of what people have said are outrageous examples where agencies have not disciplined managers, but the agency certainly has the authority to discipline the managers.

I really think that an employee today in any agency gets looked at very hard if he or she loses a case where he or she was the discriminating official. I really—they really undergo a lot of scrutiny by their agency, because the agency doesn't want to live with that kind of thing.

So there are disciplinary cases taken. In some of them the agency just flat disagrees that this employee did anything wrong and have not taken action, and the civil rights community has become outraged by that. But I don't think there should be an independent system to do that. I think the head of the agency is responsible for that agency, has to make the decision whether or not to discipline the person.

Maybe a requirement that they look at the individual cases—the head of the agency look at the individual case every time someone is found guilty of discrimination or to have discriminated would make sure that none of them would slip through the cracks.

Mr. MICA. Mr. Wolcott, would you like to respond?

Mr. WOLCOTT. Yes, I would like to say there should be clearer sanctions for managers who are found to discriminate, and there are procedures in the Federal Employee Fairness Act that would beef up the ability of agencies to take that kind of action. I think it is warranted.

Mr. MICA. One of the suggestions—maybe you have heard some suggestions—is that either a nominal fee be charged or the employee be responsible for some of the costs in appeals or complaints that are filed. Does anyone think that that should be instituted?

Mr. SHAW. I think the "loser pay" concept, especially involving the Federal Government, essentially says that you can't afford to bring an action against the Federal Government.

The Federal Government has a much higher responsibility than a private employer does to be fair, to make sure that an employee's rights are protected, just by the nature of the fact they are the Federal Government, and the Constitution and the laws really constrain them, and should constrain them.

Mr. MICA. So, no?

Mr. SHAW. I am afraid what it would do is, it would stop valid complaints by low-level employees that couldn't afford the $100 filing fee or couldn't afford to take the risk that they might have to pay for the process.

For the Federal Government to do a "loser pay" I think would not be appropriate.

Mr. MICA. Mr. Levinson. Mr. Fischer.

Mr. LEVINSON. I would question whether the realignment of a fee issue would do all that much to correct the infirmities in the current system. To my mind, if the unified agency——

Mr. MICA. You don't think it would cut down on the complaints and appeals?

Mr. LEVINSON. It is going to cut down on certain complaints, and the question is, are we cutting down on the kind of complaints we think shouldn't be filed in the first place, or are we in effect chilling those meritorious claimants because, as Jerry said, they don't have the $10 or $100, or whatever, to file.

There is something of a balance right now in the system in which there is, in effect, a, quote-unquote, free appeals process system through an agency like the MSPB, although attorneys' fees up front are certainly not paid. In order to get professional counsel, there is a need to arrange for that.

Looking in terms of structural change, I think if you look more toward changing the intake system itself to better separate meritorious from nonmeritorious claims, that that time will be more effective in cutting down on the numbers that deserve to be cut down.

Mr. MICA. Did you want to respond, Mr. Wolcott?

Mr. WOLCOTT. I would like to say that I agree, a broad fee wouldn't solve any particular problems and would have certain fairness implications.

I would like to say the grievance and arbitration procedures do have a sort of cost evaluation element to them, because the union pays the cost of arbitration, so frivolous cases don't get arbitrated.

Grievances may be filed, but once the internal grievance procedure gets to the point where arbitration has to be invoked, the union can decide, will decide, and often does decide not to arbitrate cases that it doesn't think are worth spending the arbitrator's fee on.

So I think that—the element that we use and that we propose very much has in it a cost-conscious approach.

Mr. MICA. A final question: Do any of you feel that any of the appeals levels should be eliminated? If so, which ones, and are there any bites of the apple that should be eliminated in the appeals process?

Mr. Levinson.

Mr. LEVINSON. The system is ripe with overlapping jurisdictions. The mixed case procedure is the most glaring example of a Rube Goldberg contraption that is infrequently used but should really be taken off the books simply because it is there and can be abused and the costs involved bear absolutely no relation to what is trying to be accomplished on the merits.

There is great potential for inconsistent rulings among and between the agencies. You didn't hear very much about it this morn-

ing, but I brought along the annual guide to MSPB law practice and that Peter Broida does every year. Last year's copy ran over 2,360 pages. This is a brief summary of where things stand on MSPB—just MSPB case law and practice. And Peter recites numerous instances where the same kind of—one action can be adjudicated, litigated, through at least two, if not more, channels.

It doesn't take all that much, for example, for someone who has been terminated from his Federal employment, who believes there was anti-union animus that motivated the termination, to be able to develop that into either an unfair labor practice charge, go through the FLRA or prohibited personnel practice that will be adjudicated through the MSPB, notwithstanding the statutory curtains that appear sometimes to be neat in Title V. There are plenty of opportunities to tweak the system so that you have multiple appeals going.

That, I think, is one of the most powerful reasons why some kind of more unified system begs to be instituted in the executive branch.

Mr. MICA. Mr. Fischer.

Mr. FISCHER. I would prefer to see most cases not subject to court review. I think that step could be eliminated.

We heard testimony that 94 percent of MSPB cases are upheld by the Federal circuit. So from the employee's perspective it doesn't seem to do much good anyway, and it certainly complicates the process, because the agencies are always looking over their shoulder, trying to figure out what a court is going to do in the name of due process.

The one area where you might want to preserve court review as a matter of tradition and because it is a very sensitive policy area would be with discrimination complaints, but for the remainder of the cases I would make them either not subject to judicial review at all or a very limited judicial review.

Mr. MICA. Mr. Shaw.

Mr. SHAW. Our proposal is that under the single court system there would be no appeal from the decision of the Article 1 court other than for EEO cases which could be appealed to the Federal Circuit Court of Appeals.

We did a little—talked about reaching decisions. You have it all on four charts, and we put it all on one. It looks more Byzantine when it is all on one. There are a lot of places in here that I would go through and eliminate steps.

Mr. MICA. Thank you.

Mr. Wolcott.

Mr. WOLCOTT. There are a few areas that could be reduced or eliminated. As I mentioned earlier, we would propose reducing the jurisdiction of the MSPB over broad categories of cases where people are covered by negotiated grievance procedures.

I think the mixed case procedure also can be eliminated, and the proposals that have been introduced in the Federal Employee Fairness Act provides for elimination of the mixed case procedure. I don't think that that is a—it's not particularly significant, but it is probably a sensible step.

I would also point out that the observation that 96 percent of the cases that appeal to the Federal circuit are affirmed might be—re-

flect the fact that there is pretty limited judicial review of those cases. I don't know that making the judicial review even more limited than it is now would serve any purpose other than to allow agencies to get off course.

Mr. MICA. Well, I want to thank each of our panelists today for their valuable contributions and their wealth of experience.

Mrs. Morella has asked that her additional questions be submitted to you. We may have additional questions that we will also submit to you.

Mr. Moran is involved in the Bosnia matter, and we will leave the record open for 2 weeks for additional testimony and also for questions and responses.

[The prepared statement of Mr. Moran follows:]

Statement of Representative James P. Moran
On Streamlining Employee Appeals Procedures
Subcommittee on Civil Service
November 29, 1995

Mr. Chairman:

I appreciate your having this hearing today in a series of hearings on civil service reform.

This issue is particularly important to civil service reform. The appeals process for federal employees is complicated, lengthy and confusing. The perception, and probable reality, is that the process deters managers from disciplining poor performers or initiating action in cases where there are conduct problems. As the MSPB emphasized in their recent report; "the wide choice of review paths available to employees serves to exacerbate" the hesitancy of managers to take appropriate action against poor performers." The current process must be examined and must be reformed.

The question, of course, is how should the process be examined and how should the reform be structured. From the second panel, we will hear from the heads of various agencies charged with administering the existing appeals process. Each of these directors will testify that the current process is not working as well as it could but that the current structure is appropriate. I tend to agree. Each of these adjudicatory and administrative departments was created to resolve a specific type of problem or concern. The EEOC hears allegations of discrimination. The MSPB hears appeals from agency personnel actions, such as removals, suspensions, reductions in pay, and denials of within-grade increases. The FLRA administers the federal labor relations program and administers the statute protecting the rights of federal employees to participate in unions. The OSC is an investigative and prosecutorial agency which litigates before the MSPB.

What you have here is not an explosion of federal agencies with overlapping mandates and jurisdiction. Instead, it is a number of distinct and specialized agencies which have a limited mission, a limited function, and a limited role. They are able to operate within that role, and for their constituencies, very well. Our mission should be to improve those operations and the entire process rather than to merely change the boxes and changes the administrations. We do not want to create a situation where

a future Congress must hold a hearing to examine the inefficient operations of a consolidated federal grievance agency and determine whether or not the component parts of that agency must be separated into independent adjudicatory and administrative agencies. Rather than merely swing the pendulum from one side to another, we should actually correct the problem and fix the process.

Again, I appreciate your having this hearing today and I look forward to the testimony of our witnesses.

Mr. MICA. We have received additional testimony that is requested to be made part of the record. That will be made part of the record, without objection.

[The additional testimony follows:]

Statement of R. Scott Fosler

President

National Academy of Public Administration

Before the

Subcommittee on Civil Service

Committee on Government Reform and Oversight

The National Academy of Public Administration (NAPA) is pleased to respond to your request to submit testimony on the very important matter of federal employee appeals. A representative of the Academy appeared before this Subcommittee two weeks ago to offer views on another critical issue under consideration by your members: performance and accountability in the federal government. Obviously, the subject of today's hearing is closely related since often, the events proceeding from performance management actions result in employee appeals in one form or another. I will address the subject of federal employee appeals systems from the perspective of past and ongoing work conducted by the Academy's Center for Human Resources Management.

INTRODUCTION

NAPA is a non-profit, non-partisan organization chartered by Congress to improve governance at all levels. The Academy's Center for Human Resources Management has several projects and studies underway on behalf of individual federal agencies to assist them in today's human resources environment. Our primary focus is on our work with a consortium of agencies to address common concerns and develop initiatives to help human

resources leaders and line managers successfully meet the challenges confronting their organizations. A panel of advisors, including NAPA elected Fellows and other experts, oversees these projects and study efforts.

In fiscal year 1995 we worked with 31 agencies to research best practices and lessons learned from the private sector and federal, state and local public levels and linked this research with examples of high performing organizations. The research, interviews, and analyses have been compiled into a series of publications on innovative approaches to human resources management. A new consortium of agencies has been organized for fiscal year 1996. It will focus on transforming the "best practices" and "lessons learned" into practical applications to improve the current federal work environment.

With regard to employee appeals, there are unresolved questions primarily about overlapping jurisdictions and processes and multiple avenues of review for essentially identical issues. As these and related questions are raised based on individual cases, it is useful to keep in mind that at this point relevant data have not been compiled and analyzed. As we examine these issues, I believe it is instructive to review the history of events leading to the present arrangement.

BACKGROUND

With the enactment of the Civil Service Reform Act (CSRA) in 1978, four agencies were given primary responsibility for adjudicating disputes between employees and agency

management. They are the Merit Systems Protection Board (MSPB), the Office of Special Counsel (OSC), the Equal Employment Opportunity Commission (EEOC), and the Federal Labor Relations Authority (FLRA). The Office of Personnel Management (OPM) and the Department of Labor (DOL) also possess authority to rule on certain federal employee claims. Any two or more of these agencies may be adjudicating a "mixed case" simultaneously. Each of these agency processes has its own time limits, procedures, and potential for conflicting decisions on the same set of facts.

In the fall of 1993, the National Performance Review (NPR) issued its first report which included a section titled "Improve Processes and Procedures Established to Provide Workplace Due Process for Employees" (HRM08). The NPR called for the President to direct "... the MSPB Chair to establish a working group to examine and make recommendations for eliminating jurisdictional overlaps in administrative due process cases." To our knowledge, the directive was not issued, but the problem, or the perception of a problem, with jurisdictional overlap persists. I understand, however, that the Congressional appropriations conferees recently included language in their report directing the Administration "...to develop a legislative proposal to restructure all Federal employee adjudicatory functions and submit this plan to Congress no later than February 1, 1996."

NAPA'S INVOLVEMENT

Over the last several years of our work with federal agencies, NAPA has heard much about the availability of multiple forums for employee disputes covering essentially the same

issues. There is great confusion about these different avenues of redress, including separate procedures, differing time limits for filing, and limited jurisdictions for review of the same set of facts. Federal agencies, employees, and unions can initiate or defend the same disciplinary action, reduction in force or performance evaluation in different forums over many years.

In response to agency requests for assistance, NAPA facilitated in the past year a number of sessions including line agency, union, and third party representatives. The NAPA-sponsored "Jurisdictional Overlap Forum", held in April of this year, is one example. The conclusions drawn from these meetings are:

1. Jurisdictional overlap continues to be perceived as a problem.
2. Timely, fair, and final decisions are perceived as problems in the current system.
3. Remedies are inconsistent among the various forums.
4. The system should not focus on non-substantive issues.
5. All the stakeholders, i.e. the adjudicatory bodies, the agencies, and employee representatives, must be involved in developing the solution.

Managers, employees, and unions are concerned about the issue of multiple and overlapping jurisdictions and procedures. At a minimum, it is perceived that there are enormous costs associated with pursuing a claim in all these forums, in terms of dollars, morale, and time. Managers are responsible for supervising the work force, but they find it

debilitating to devote so much of their time to defending cases on the same issues involving the same people. As a result, they have less time to devote to the work of the agency. It is also demoralizing to employees and unions who, believing an injustice has been done in a particular personnel action, feel they must launch multiple complaints through a multitude of channels. They do this because they fear missing the one forum that might provide relief — and even then they might wait years, perhaps, before a decision is made.

Having said all this, however, we must bear in mind that there are many who would assert that the problem of multiple and overlapping appeals jurisdictions and processes is more perceived than real, and that due process should not be sacrificed in pursuit of a "one size fits all" approach. Many would argue that our primary goals should be to resolve employee-management disputes at the earliest possible stage of any process, with managers assuming responsibility and accountability for taking appropriate actions in a timely manner. In the absence of informal resolution, the object should be to ensure expeditious and final decisions, and to assure due process in all cases. No appeals system will be credible to managers, employees, Congress, or the public unless it assures due process for the parties involved. Assuming agreement on these primary objectives, the remaining questions have to do with what kind of system(s) will ensure due process in pursuit of these objectives.

Many alternatives have been proposed, such as: creating a new federal agency to handle all cases involving employee-management disputes, mandating alternate dispute resolution processes tailored for specific issues, and establishing a special federal court for

employee disputes and arbitration, to name a few. One has to look at the relative merits of these and any other alternatives to develop a due process procedure that satisfies the concerns for fairness, efficiency, and simplicity.

At the request of the agencies participating in our 1996 consortium, we are continuing to address the question of overlapping or multiple appellate jurisdictions building on the work we did this past year in meetings and workshops. Agencies asked that NAPA undertake this review because our independent status should facilitate impartial development of a solution, and because an objective, comprehensive study is needed to provide a proper baseline for decisions about legislative change. Our Center for Human Resources Management is currently targeting this review for completion in early 1996.

CONCLUSION

Congress, government managers, employees, and unions are seeking to improve the performance and credibility of government. One of the first steps to be taken with respect to employee appeals systems is to develop objective data upon which appropriate decisions can be made to rationalize, streamline, or, in some cases if warranted, eliminate and consolidate existing procedures for federal employee disputes.

NAPA recommends that Congress continue to review and study all current appellate jurisdictions and systems with the objective of designing a new system with clearly delineated jurisdictions, streamlined procedures, and timely decisions, while assuring due process for

employees, agencies, and unions. Doing this may send one of the strongest signals that the government is serious about its intent to improve the management of its most valuable asset: federal employees.

NATIONAL ASSOCIATION OF POSTMASTERS
OF THE UNITED STATES
8 HERBERT STREET
ALEXANDRIA VA 22305-2600

STATEMENT

OF

DAVID GAMES

PRESIDENT

OF THE

NATIONAL ASSOCIATION OF POSTMASTERS

OF THE UNITED STATES

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE

OF THE

HOUSE GOVERNMENT REFORM AND OVERSIGHT COMMITTEE

ON NOVEMBER 16, 1995

(703) 683-9027
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Chairman Mica, Members of the Subcommittee, thank you for allowing us to submit this testimony. The National Association of Postmasters of the United States (NAPUS) is a postal management organization which has been in existence since 1898. We represent more than 43,000 active and retired postmasters throughout the United States.

As postmasters, we are both managers and employees of the Postal Service. As you know, postmasters are responsible for the day to day operations of the post office in each city and community. They must meet the daily challenge of providing service to the public, creating incentives for employees who do the work, and meeting the demands of productivity and budget established by the Postal Service. It is the postmaster who assigns work duties, who hears complaints from customers, and who bears the ultimate responsibility for the financial success or failure of that particular office.

As managers, we understand the problem of poor performers and realize that employees should not have unlimited rights to appeal. Therefore, we are not here to oppose any and all attempts to streamline the appeals process. It is our understanding that this Subcommittee is considering combining causes of action under a single adjudicative agency. Without further information on a specific proposal, NAPUS cannot take a position either in support of or opposition to such modifications in the current appeals process. However, we do want to speak in support of a process which we believe <u>does</u> work and which actually reduces the burden on the federal appeals court. That appeal avenue is the Merit System Protection Board (MSPB).

Unlike union employees, postmasters do not have access to a grievance process. This means that MSPB rights are particularly important for postmasters because they provide the

only forum available to them for appealing serious adverse actions to an independent, external body. Such adverse actions include removals, reduction in pay or grade, or suspensions over 14 days. When a postmaster has a case before the Board, it generally involves some disciplinary action rather than poor performance. The postmaster may face a serious charge, such as misuse of postal funds, which would result in loss of his or her job. Clearly, these are cases where the due process rights of the employee are vital. Therefore, NAPUS wants to take this opportunity to support the continuation of postmasters' access to the MSPB process.

Prior to the Postal Reorganization Act of 1970 (PL 91-375), postmasters could appeal an adverse personnel action through the Civil Service Commission (now replaced by the Office of Personnel Management). NAPUS supported the Postal Reorganization Act. That support was based on assurances from the Postmaster General of that time, William Blount, that postmasters would preserve the rights they enjoyed under the old post office department, including the right for a fair hearing on adverse actions. The legislation which gave postmasters and postal supervisors MSPB rights enjoyed wide popularity on both sides of the aisle and was endorsed by all Members of the Post Office and Civil Service Subcommittee. In fact, we note that two current Members of the Civil Service Subcommittee, Rep. Ben Gilman and Rep. Dan Burton, endorsed the bill when it was being debated in the 99th and 100th Congress. President Reagan signed PL 100-90 granting MSPB rights to postmasters and supervisors into law in 1987.

Extending MSPB rights to all postmasters and supervisors provided equity to non-veterans, primarily women in the postal workforce. Most female USPS management

employees and virtually all managers under the age of 45 are nonpreference eligible employees. Prior to passage of PL 100-90, they had no access to an appeal process outside the Postal Service except for the EEOC process. Without access to the MSPB, non-veteran postal employees with many years of service could be dismissed arbitrarily without any third-party recourse.

When this legislation was first introduced, it was considered necessary because the existing appeals procedures were thought to be obstructive to due process. "There are possibilities of conflicts of interests when an appeals case is reviewed by the same agency which made the adverse action decision" [Oct. 9, 1985 hearing before the Postal Personnel and Modernization Subcommittee]. In the internal appeal process, the Postal Service served as investigator, prosecutor, trier of charges and decisionmaker. The Postal Service's internal personnel procedures were relatively informal , did not provide an outside adjudicator and the tendency was to support the original action. MSPB has provided low cost access to appellants of a timely and efficient third-party appeals process that includes an opportunity for settlement at initial and appeals level.

A benefit of the high settlement rate in MSPB cases is that it has protected agencies from costly federal proceedings. MSPB process provides an opportunity to expedite the resolution of problems, clarifies the issues and allows parties to focus their objectives and resources more efficiently. As a result, fewer public resources are being spent on litigation by the agencies. In the case of the Postal Service, the reduced costs are enjoyed by ratepayers in the form of less costly postal rates. At the same time, the MSPB proceedings protect federal and postal employees from arbitrary actions.

This is not a process which prevents agencies from dismissing poor performers. As MSPB Director of Policy and Evaluation Evangeline Swift testified on Oct. 26, only 20 percent of all removals and demotions are appealed to MSPB. Of those initial appeals that are not dismissed, the agency action is overturned or a penalty reduced only about 13 percent of the time. Presumably, the concerns raised by the Senior Executives Association witness at the October 26 hearing were more focused on the number of appeal avenues for employees, such as the grievance process and the EEO process, rather than on any specific appeal procedure.

The goal of any appeals process is that it should be as straightforward and uncomplicated as possible and that proceedings and rulings should be timely. Appeals Boards such as the Merit Systems Protection Board or the National Labor Relations Board were created to stop the flow of cases to federal court. Additionally, MSPB helps to resolve conflict very efficiently -- cases are handled in about 120 days. Removing the MSPB appeals process would actually end up being costly to federal agencies, to the Postal Service and, ultimately, to the public because adverse actions would be appealed before the federal court. However, expanding the number of cases it handles may overburden the system without providing more timely results for appellants. We will be interested to see further information on the Subcommittee's proposal.

This concludes my testimony. Thank you for allowing us this opportunity to present our views.

Mr. MICA. I want to thank you for your cooperation. We are looking at proposed changes very carefully as we review the entire civil service reform issues.

My timing couldn't be much better than this—the bells are ringing. I want to thank you for your participation and look forward to working with you.

If there is no further business to come before the subcommittee this morning, I declare the meeting adjourned.

Thank you.

Mr. SHAW. Thank you, Mr. Chairman.

[Whereupon, at 12:55 p.m., the subcommittee was adjourned.]

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